

A Blind Lady Justice?

The Strategies of Confirmation in Justice Sonia Sotomayor's Confirmation Hearings

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Justice Sotomayor's Confirmation Hearings: Normalization and Strategic Responses

Prologue

In Fall of 2009, at the same time that Justice Sonia Sotomayor was being prepped on how to handle herself during her Confirmation Hearings to the Supreme Court of the United States, I was in a Judicial Politics class at Ohio State University. In my memory, 28 of the 30 students appeared to be white, and 20 of the 30 appeared male. One particular lesson still stands out: the teacher lectured about the history of Supreme Court confirmation hearings and concluded that nominees have historically been confirmed to the Supreme Court except in cases of extraordinary controversy. Immediately after this point in an effort, perhaps, to wake us up he asked us to raise our hands if we believed that, in keeping with this history, Justice Sotomayor should *not* be confirmed to the Court. Almost every single hand shot up. The classroom atmosphere went from slightly bored to stimulated, energized, even *incensed*. People couldn't speak fast enough, couldn't finish their sentences without others tagging in:

“No one should be allowed to make comments like that. What if I said, ‘in my experiences as a white male I’d make a wiser decision than a minority woman?’”

“I think the best way to stop discrimination is to just stop doing it, so I don’t think we should be looking for judges with empathy, we need judges with qualifications.”

Introduction:

By this point, Justice Sonia Sotomayor had an extensive judicial record. She graduated *summa cum laude* from Princeton and received her law degree from Yale. Sotomayor was an assistant district attorney and in private practice before being nominated, by President George H.W. Bush, to a federal district court in 1991 and confirmed in 1992. In 1997, President Bill

Clinton nominated her to the U.S. Court of Appeals for the Second District. In 2009, President Barack Obama nominated Sotomayor to the U.S. Supreme Court. By the time of her confirmation hearings she was widely noted for having significant judicial experience and was regarded as highly qualified for the Supreme Court.

Despite these professional qualifications, many believed Sotomayor to be a controversial figure. This controversy is widely attributed to her wise Latina comment: “I would hope that a wise Latina, with the richness of her experiences, would more often than not reach a better conclusion.” This statement was part of many speeches that Sotomayor gave to Latino/a youth to encourage them to enter law and to consider their personal experiences as valuable to the legal profession. Sotomayor says that her comment was a play on words from a quote by Justice O’Connor, the first female (white) judge to be on the Supreme Court. While this quote is particularly interesting, it was not unpacked or analyzed at her Confirmation Hearings –though it was particularly salient. Moreover, this quote should not be viewed as the entire reason that Sotomayor was controversial.

Rather, an examination of Sotomayor’s Confirmation Hearings to the Supreme Court indicates that the controversy about Sotomayor’s wise Latina comment is actually part of a larger discourse on race and sex within dominant United States culture. It is not Sotomayor’s wise Latina comment itself that made her controversial- but rather her frank discussion of race and sex, and how these contrast with color-blindness and our dominant belief in the lack of institutional racism/ sexism. Sotomayor was poised to become the first Latina on the Supreme Court- the first woman of color on the court. This raced and sexed reality was key to the way that she was treated and the way that she performed in her Confirmation Hearings.

I want to consider Sotomayor's hearings as a continuation or a part of a larger societal discourse on race and sex. Given Sotomayor's embodiment and marked bodily "difference" I believe assumptions about her body are more obvious. However, I believe similar assumptions would be found in other judge's hearings. In short, I hope to consider Sotomayor's hearings as a part of a continual normative discourse and performance. I will suggest, following in the veins of Michel Foucault, that the senators did not act out a dominant/ subordinate binary of power, but instead revealed their own interest and investment in the continuation of normativity. I look at how senators act out normalization, what features of Sotomayor's identity the senators' deem worthy of discussing, and how they position Sotomayor as in or out of the norm (by way of white, male judges).

Likewise, I am interested in how Sotomayor functions within this setting herself- how she performs and what strategies she uses to gain the confirmation. Policing and normalizing is commonplace. Everyone does it or has done it at some time. What I am interested in is how this is done in Sotomayor's confirmation hearings. I hope I can demonstrate here that this normalization is intrinsically linked to how Sotomayor is perceived and to particular discourses on race/ sex/ sexuality/ class. Sotomayor's hearings should not be analyzed as outside of these normalizing discourses. Rather, her hearings should be seen as a perpetuation/ continuance/ replication of these normalizing discourses.

I want to put the race/ sex/ sexuality/ class into our analysis of her hearings- not because these discourses were not present in other judge's hearings (because they were) but because these discourses have been ignored by the people that study confirmation hearings. Feminists/ critical race theorists/ queer theorists and so on undoubtedly will already see the raced/ sexed/ sexualized/ classed nature of Sotomayor's and the senators' actions/ words at her hearings.

However, feminists/ critical race theorists/ queer theorists have not yet taken up Sotomayor's hearings. The scholars who have, mainly political scientists, other judges, or journalists, have not examined the hearings with an eye to the body.

They look at political ideology/ partisanship and/or judicial norms, while simultaneously divorcing these theories from race/ sex/ sexuality/ class. In splitting these theories from the experiences of bodies, they are in fact race-ing, sex-ing and sexualizing these areas themselves as white, heterosexual and male. They argue, implicitly or not, that race/ sex/ sexuality/ class are *unrelated* to political ideology/ partisanship and/or judicial norms. One very easy way to see this is in the lack of spoken discourse or questioning on Sotomayor's class and sexuality. Sotomayor is known to be upper-middle class (she is both highly educated, from elite universities, and has been a judge for seventeen years) and is "read" as heterosexual. She was married (and later divorced), does not have short hair and she wears skirts.¹

Because her class and sexuality are "normal," the senators *are not troubled by these categories*. This is what they expect, what they see and perhaps also the things with which they are most comfortable. They do not bother to ask her about these identities because they are not "different," and therefore, they are not threatening, they are normal. Moreover, because they are normal and unthreatening, they cannot influence her or create bias. Rather, it is her race and sex that are identified and become the focus of questions about bias, prejudice, empathy and impartiality. This is not to say that class and sexuality are not part of the discourse of the

¹ Moreover, it is often difficult for people to conceptualize raced bodies as non-heteronormative (as queer). See *Queer Latinidad* by Juana Rodriguez for how race and sexuality are often viewed in contradictory terms, especially in court.

hearings, but that the silence on these issues is actually a tacit acknowledgment of normativity (about what does not need to be marked and is therefore normal).²

In this paper, I seek to interject critical race, feminist and queer theories into analysis of judicial confirmation hearings. Political science research on judicial confirmation hearings, particularly on Sotomayor's hearings, has had the tendency to avoid an examination of Sotomayor's real, physical body and the implications that her body might have had for the senators. Instead, political scientists have argued that Sotomayor's hearings are to be seen as a continuation of divisive political partisanship and a related evasiveness in discussing political issues. Being evasive allows one to appeal to both political parties to gain confirmation.³

However, such an analysis necessarily ignores race, gender, sexuality, and other areas of identity. For example, consider the following statement, which I believe to be in line with other political scholarship not necessarily in what it argues in terms of frameworks or theories, but in the way that it *abstracts Sotomayor from her body*:

Since the Senate confirmation hearings of Judge Robert Bork, Supreme Court nominees have rarely been forthcoming in answering questions about their personal views on controversial topics, including how expansive a judge's role is in deciding cases... [Senators] question whether Judge Sotomayor could be dispassionate in her decision-making. The process surrounding Judge Sotomayor's confirmation reflects the perennial debate as to whether, and to what extent, a judge's personal experiences should influence his or her adjudication of disputes. The questions posed by the members of the Senate Judiciary Committee and Judge Sotomayor's responses provide the framework for the instant analysis of the proper role of a judge. Rather than an examination of Judge Sotomayor's judicial philosophy, as reflected in her seventeen-year career as a judge... the focus of this

² Here I am thinking of both Michel Foucault's analysis of discourse and power.

³ This is not to say that all political science work ignores the body. For example, there has been much activity around the impact of a Senator's or political candidate's body on votes, especially in terms of descriptive or symbolic representation. There has also been some consideration of how judge's identities may impact their decision-making; i.e. that women might be more likely to support discrimination claims. However, this work has not focused on judicial politics and how judge's bodies are represented or viewed- specifically in confirmation hearings.

article is on where we are in the public conversation regarding the role of a judge (Davis 2009).

This analysis is problematic. The idea of being “passionate” or rational cannot be divorced from an analysis of how a racialized and gendered body impacts how a person is perceived as being either passionate or rational, as out of control or logical. It is not enough to say that Sotomayor was being evasive because all judges are always evasive about issues ever since Bork’s scandalous confirmation hearings.⁴ Rather, we must analyze how and why they are evasive. Here, I think critical race, feminist and queer theories about processes of “normalization” are particularly relevant, as well as Richard Dyer’s work on explaining whiteness and the split between body and mind.

I am considering “normalization” as a continuous, though often unrecognized, process that occurs on both the systemic and individual level. I am following Michel Foucault’s theories of power as being *normative*. The “norm,” the normal, is powerful because it replicates itself on a systemic and individual level. Confirmation Hearings are then a systemic way to check to ensure normalcy, and compliance with the norms of our society. On an individual basis, people undergoing this process or living in this space and time have a material and emotional interest in policing themselves to guarantee that they comply with norms. However, the normal is so normal, so expected that it is *unmarked*. The normal is so salient and so present that it is actually silent. In this way, the “normal” is raced, sexed, sexualized, classed and so on as white, male, heterosexual and bourgeoisie but is generally unmarked and assumed. Similarly, these categories are –because of their inherent normalcy– neutral. People that are excluded from these categories of normalcy are “others” and are viewed as biased.

⁴ I am referencing a conservative judge’s confirmation hearings, in which he gave his personal political views and was subsequently attacked by Democrats and not confirmed as a justice. This incident is so well known that it is now a verb (“to bork” someone, to be “borked”).

Impartiality, especially in the legal context, means the ability to be neutral, to be aloof from your situation, to not be influenced by emotions. This abstract idea is deeply connected to one's ability to control and overcome one's body. Richard Dyer explains the Western, historically raced, gendered, classed, sexualized, etc binary that disassociates and hierarchizes the "mind" from the "body." As Dyer argues, building on Christian theology, Westerners have located the body as a site of uncontrollable, inescapable sin. In contrast, the mind and rationality can overcome this sin, at least to an extent. However, these abilities are raced, classed, gendered and so on in that whites, bourgeoisie people, heterosexuals and men are given the privilege and expectation of having control over the body, that is, of being rational. Meanwhile, raced, poor people, women and queers are viewed as forever inhabiting and unable to transcend or control their body. Moreover, their lived circumstances may actually further this theory (i.e. a poor person may not be able control the situation around them to be able to arrive at work on time; a woman may not be able to control her bodily fluids).

These categories of body/mind interact and intersect in multiple ways, so that individuals are privileged and marginalized at the same time, in various ways. Lived experiences are different based on one's body and how one's identity is perceived. Moreover, these identities and perceptions of identity are always in flux and ever-changing. In one time and space a person can be a straight, White, bourgeoisie male and in another, a poor gay woman. Or, a person could be perceived as White, when they actually identify as Black, etc.

Impartiality denotes neutrality and the ability to rationalize without bias. These elements are achievable only by those who are able to be of the mind, to think beyond their personal opinions and to therefore *control* their emotions and bodies. (In other words, all those things that are classed, raced, gendered, etc.) We hold judges up to this ideal of impartiality.

When we interject these theories about normalization, race, gender and neutrality, the focus of analysis on judges shifts. It is not just the role of a judge that is important, but also the process by which a person becomes a judge. What identities must they perform? How do they achieve impartiality? How do these norms relate to larger discourse on race, sex and identity? In Sotomayor's confirmation hearings, perhaps particularly because of her body and her marked "difference," issues of race and sex were foregrounded.⁵ However, I would like to suggest that we need not consider an analysis of her hearings as in opposition to Alito's or view the discourse of other hearings as distinct from that in Sotomayor's. In this paper, instead of directly comparing Sotomayor to Alito, I am interested in what function it serves for senators to compare Sotomayor to Alito. How does positioning Sotomayor against Alito serve the senators' purposes? What does it say about our society and dominant views on race, sex, body and power?

General Information about Confirmation Hearings

The senators of the Senate Judiciary Committee are entrusted with the role of "advising and consenting" to the president's judicial nominees. This means that senators review not just potential Supreme Court judges, but all other federal judicial nominees. The lower the court, the more power the senators have over who is nominated and confirmed. Judges for these lower courts are generally nominated by senators, who become aware of a judicial vacancy and then seek to fill it. Nominations to the Supreme Court, however, come from the president. Senators from the judge's state are given "blue slips" to give either a favorable or unfavorable opinion of the judge. These opinions are taken into account when the Senate Judiciary Committee reviews

⁵ Although, I do not analyze the confirmation hearings of other judges, I do think that these ideas about normalization, impartiality, race and sex can be found in other judge's hearings. I encourage other scholars to take up the question of how, for example, Justice Alito's body, identity and words were interpreted or discussed in their hearings.

judges. The committee itself, in 2009, was formed of nineteen senate members, who were supposed to question the nominee on his or her qualifications and then report to the full Senate on whether or not to vote for the judge.

Justice Sonia Sotomayor's Confirmation Hearing lasted five days, from July 13, 2009 to July 17, 2009. On the first day, each of the nineteen senators and Sotomayor gave short, uninterrupted opening speeches. There was no interaction between the senators. The next three days the senators alternated questioning Sotomayor by party and seniority. Only Sotomayor was allowed to respond to the questions, though Senator Leahy, the chairman, did interrupt at times (such as to call time). Beginning at the end of the fourth day and continuing into the fifth day, the senators brought in eight-person panels to testify about Sotomayor's qualifications.

The demographics of the Senate Judiciary Committee are summarized in Table A on page 66. Every single member of the Senate Judiciary Committee was white. Moreover, they and their parents were all native-born- except for Senator Specter, who was born in Kansas to Russian immigrant parents. The committee was overwhelmingly male- 17 of the 19 people (89%) were men. The median age of the senators was 65, though it ranged from 49-79 years. In comparison, Sotomayor was not white and she was not male. At 55, she was significantly younger than the median age of the senators, but still within the range.

The room was set up to highlight the disparity between the committee members and the person being interviewed. The committee members sat higher than the nominee, in a U formation, in expensive, high-backed executive chairs covered in black leather. Sotomayor sat apart from and below the senators, at the mouth of the U, at a separate table in a shorter, plastic-backed chair. The senators could look out over the audience and Sotomayor, while she could only see the senators. The audience had a clear view of the senators but could only see Sotomayor's back.

The senators were aware of the public nature of the hearings. It was commented on multiple times by senators of both political parties. Senator Leahy, for example, says on the very first day of the hearings: “This hearing is an opportunity for Americans to see and hear Judge Sotomayor for themselves and to consider her qualifications. It is the most transparent confirmation hearing ever held” (3). Later on the same day, Senator Al Franken addresses his colleagues, saying: “I look forward to listening to your questions and to the issues that you and your constituents care about” (47). On the fourth day of the hearings, Senator Hatch says “[these] are important questions to me and millions of other people that I represent” (283). Senator Leahy adds, “During the course of this week, almost 2,000 people have attended this hearing in person—2,000. Millions more have seen it, heard it, or read about it, thanks to newspapers, blogs, television, cable, webcasting. And I think through these proceedings, the American people have gotten to know you” (303). And they probably did- just as they got to know the senators who were asking the questions. Thus, throughout the confirmation hearings, senators were repeatedly reminded about the distinctly public nature of the hearings.

Within this setting, we can expect that senators considered their visible, public role and attempted to remain within their perceptions of the beliefs of their constituents. To do otherwise risked political ramifications, including losing votes and campaign contributions (depending on the exact nature of the gaffe). We can therefore believe that most every statement that the senators made was planned and purposeful. With this then, the questions that the senators ask, and the areas that they focus on are particularly enlightening as to how they view the world. Whatever they say, they believe it to be politically acceptable- that it will not cost them politically. Moreover, they recognize that the hearings will be a way for them to discuss issues

beyond just the Supreme Court. For example, Senator Graham says: “I think we’re sort of grappling with issues right here in the Senate the country is grappling with” (Day 3, 329).

However, the senators did not so much “grapple” with the “issues” so much as continue the existing discourse on them. In particular, the Confirmation Hearings can be viewed as a way of testing the limits of tolerance and neutrality. Just how “different” can Sotomayor be without losing the nomination? Within her Confirmation Hearings, we can see how a raced and gendered justice tests the limits of our conception of neutrality and maneuvers to be accepted into the norm.

Body => Political Party

Today mainstream American society has a tendency to attribute most political discourse to the policy positions of political parties, and specifically, to either the Republican or Democratic Party. When people discuss issues of race, gender, sexuality and/or nationality, there is an attempt to determine a person’s political party and thus categorize or deduce their positions on various political issues. In fact, political party has been found to be a heuristic, a “mental shortcut,” that people use to categorize others and determine other people’s ideologies and political positions. Many political scientists and much of the newspaper/ media coverage of Sotomayor’s hearings focused on Sotomayor’s relationships to the two dominant political parties, i.e. her treatment by senators was attributed to the senators’ political parties. However, these same political scientists and journalists/ news anchors fail to account for the history of race within the United States, the related implications of marked bodily difference (i.e. race/ sex) on a person’s political party choice, or the assumptions that raced/ gendered bodies carry (as a result of history).

First, I should note that political party does not carry the weight of body. It is not a marked bodily difference. A person does not decide to vote Democrat and then have some sort of physical transformation that instantaneously marks them to others as a Democrat. Moreover, political party affiliation (like race/gender to an extent) can change over time or circumstance. Just because I vote Republican this election does not necessarily mean that I will vote that way forever (if party affiliation is fixed, then all political campaigns should just stop immediately). In this way, political party should not be viewed as a category of the same importance as bodily difference. We do not see political party marked on a person's body.

However, we do see race/ gender and this is connected to political party. Specifically, we see historically raced and gendered bodies- i.e. bodies that are "different" from the norm. Moreover, once "mainstream" society see these bodies, we make certain assumptions about them. If we see a black person, for example, we may immediately assume that this person will be liberal or support Democrats. This is important, because, reading some political science it appears that we see a person and then somehow assume a political party affiliation without any consideration of their body. In reality, political party is not marked.

Moreover, it is only raced/ gendered people that are classified. We cannot assume that a white man is either Democrat or Republican. For him, our decision is not based on his body, but on an evaluation of his beliefs. For those with marked difference, i.e. a Latina, we might immediately assume that she is a Democrat or a liberal. *He* is able to transcend, be above his body, have rational choice in his ideologies. *She* is instantly identified by her body, and our view of her is influenced by her position in that body. Our initial reaction is to categorize him as neutral or at the center, and her as left, liberal, and Democrat.

In addition, when we do learn a person's political affiliations, their body changes how we perceive their politics. David King's study, "Sex and the Grand Old Party" provided survey participants with a brief message about a hypothetical Republican candidate and asked respondents how likely they would be to vote for this candidate. Half of the respondents were told the candidate was a male, the other half were told it was a female.⁶ King found that female Republican candidates have difficulty in being nominated or supported- especially by strong Republicans. These candidates gain "crossover" support (support from across party lines) from Democrats and Independents. King concluded that there are few female Republicans in office because they fail to get support in primaries (when more partisan people turn out to vote) (King 2003). However, I would like to suggest that more important than this conclusion is that this study reveals what I have been arguing- that political party is not everything, the *body does matter*. A person's body, in this case their gender, signals *something* that people assume about them.⁷ Otherwise, there would be no difference in support for female Republican candidates versus male Republican candidates. Moreover, it is not enough to say, for example, that strong Republicans are sexist- rather, the fact that Democrats and Independents tended to give "crossover" support to female candidates shows that people, regardless of political party (or perhaps, in spite of political party) make assumptions about others based just on their body.

There are some historical reasons for these assumptions. First, the history of the Republican and Democratic parties is such that whites have been leaving the Democratic Party

⁶ The only bodily characteristic that was marked was gender. I suppose that this was to make sure that the candidate appeared "neutral" except for sex. That is, that we could assume the candidate was a white, straight, bourgeoisie (fe)male. See Winnubst 2006, particularly chapter 1: "Liberalism's Neutral Individual."

⁷ King points out that with more information about the candidate's views, people tend to rely less on their "gender schematas" (their short hand assumptions about women/ men) and more on evaluating the candidate's opinions.

ever since the party began allowing raced bodies to enter, i.e. in the 1930's and particularly in the 1960's when the Democratic party began pushing for the Civil Rights Act and other protections for raced individuals. Similarly, more women tend to affiliate with the Democratic Party due to its support for "women's issues" such as public education and access to healthcare, although historically it was the Republican party that first supported women's suffrage and attempted to push through the Equal Rights Amendment. There appears to have been a shift in the 1960's and 1970's from women aligning with the Republican party to supporting the Democratic party. In contrast, white men have always been a part of these political parties and the contributions of the parties to this group is unmarked- just as their race/ sex is unmarked. Both political parties have overarching priorities, with varying concessions to "difference," to raced/ gendered individuals. In both groups, white men are the unmarked norm- their priorities are central to the parties, such that even the Democratic party does not have a "White Caucus" though it has, for example a "Black Caucus," a "Women's Caucus" and an "LGBT Caucus." This is not because whites' concerns are nonexistent, but because their bodies and concerns are unmarked- even within this "liberal" political party. The Democratic Party does not think that the policy preferences of White, straight male need to be marked, and precisely because they are not named, they both become and perpetuate the norm.⁸

Because of these considerations, privileging political party over other forms of analysis is, really, a privileged thing to do. A focus on political parties masks real raced/ gendered differences in how people are perceived, how institutions function and what bodies hold power. Focusing on political party assumes an ahistorical position- that a person's body is distinct from

⁸ See research in critical whiteness studies, or for example, *Displacing Whiteness* edited by Ruth Frankenberg or Winnubst 2006 for how whiteness attains and perpetuates its power precisely through being unmarked.

the history that shaped how that body is perceived, or its social and physical location in the world. Placing political party as the center of analysis *necessarily* marginalizes the impact and reality of raced/ gendered bodies on discourse, thought and representation. Only people who are unaffected by their body (by how it is perceived, treated, depicted) can afford to casually mention that the abuse that a person of color suffers at the hands of politicians is “just the way that politics works.”

Therefore, while I do believe that there is a historical relationship between race/ sex and political parties, political party is not at the center of my analysis of the Sotomayor’s Confirmation hearings. In fact, doing such a thing is precisely the work I am trying to avoid. Political party is a reflection of lived experiences and ideologies and therefore secondary to and follows *from*, body. How a person becomes affiliated with a political party (i.e. through community, family, friends, relationships, jobs) is contingent upon first their body and its temporal and physical location, then on their mind and how they process this information (perhaps with some outside factors).

However, that is not to say that I will ignore the factor of political parties. There *are* some differences in how the parties treated Sotomayor: Republicans interrupted her more; they had harsher tones and seemed more concerned about her ability to be neutral or have a good judicial temperament. However, both parties relied on essentialist, raced/ sexed assumptions about Sotomayor’s ability to judge. Moreover, both Democrats and Republicans attempted to position Sotomayor in contrast to other, mainly white male, judges to either prove or refute her ability to reason, decide cases fairly, and control herself. For me, it is these similarities between the two parties that are more interesting than the differences.

Relatedly, I am interested in the strategies Sotomayor uses to gain the nomination. Namely, she appealed to liberal individualist notions of America and the American Dream, she

performed white masculinity and she distanced herself from specific statements and professional activities that “excessively” raced or sexed her. I would like to consider how these strategies were a way for her to normalize herself- to bring her body back into the mainstream, and to therefore gain support or avoid a filibuster. In this way, I am curious as to what extent these strategies were a form of disidentification, wherein Sotomayor both yielded to and co-opted the political process to push against it.

Accordingly, this paper will first examine how senators treated Sotomayor, and what their comments revealed about their beliefs of her body. As part of this analysis, I look at how beliefs about her body tie into senators’ assumptions about her future judicial decisions, i.e. regarding immigration. Next, I identify three strategies that Sotomayor used to normalize herself and gain acceptance: performing white masculinity, appealing to American liberal individualism and distancing herself from previous statements/ actions.⁹ I argue that the wise Latina comment and Sotomayor’s activities with the Puerto Rican Legal Defense Fund are deemed unsalvageable. Rather than attempt to explain, justify or defend these things, Sotomayor instead ends up distancing herself from them. These strategies are indicative of the way historically marginalized people must operate to survive within dominant political culture.

Methodology:

First I accessed the video footage of the confirmation hearings online at cnn.com. This gave me a good sense of the tone of the senators, the atmosphere in the hearings, the layout of

⁹ I also point out that “performing white masculinity” and appealing to liberal individualism are not necessarily two distinct categories. I am separating them to look at first her bodily performance/ narratives about body and then her ideological appeals.

the room, and a quick view of the represented or performed races and sexes.¹⁰ In this way, I flagged specific instances when the senators' tone and words appeared particularly emotional or interested- whether in a supportive, paternalistic or accusatory way.

Next, I read through the transcripts of the hearing as provided on the New York Times' website. These transcripts are readily accessible. However, because they appeared online, the transcripts are not divided into pages. I copied and pasted these files into Microsoft Word documents, thereby providing page numbers. The page numbers of the quotations in this paper are the page numbers from those Microsoft Word documents. Each day of the hearings took up roughly 100 pages in the Microsoft Word program. The page numbers therefore correspond in part to the time of day- the lower the page number, the earlier in the day the statement was made. When reading through this first time, I sought to identify the issues that were discussed, look for repetitive themes and note when race, gender, sexuality or class was mentioned. On the next read-through, I kept a detailed record of the number of interruptions that appear on the transcript, when senators spoke on the themes that I had identified, and any quotes that dealt implicitly or explicitly with race, gender, sexuality or class.

After this, I searched for demographic information on each of the senators who were part of the Senate Judiciary Committee in 2009 during Sotomayor's Confirmation Hearings. This data is from several sources: first, from the U.S. Census estimations and projections for the year 2010, which is the closest available to the year 2009. The information about the senators' party, state and age are all derived from their official, individual senate websites, which I am listing in a separate section before my "References" page. To determine the races/ ethnicities, I first

¹⁰ I admit that it is problematic to rely on this for determining bodily characteristics because it means that I made quick assessments about what races people appeared to be, rather than learning with which races they might identify. However, I did not rely on these in constructing Table A, but instead did a much more thorough search for self-identification.

searched the biography section of their senate websites. I searched for each of the following key words: white, black, Hispanic, latino, Asian, Mexic*¹¹, Puerto*, Cuba*, Mid*, Arab*, ethnic*, immig*, emig*, multi*. I chose not to search for words like “German” or “Irish,” i.e. ethnicities that are already assimilated as part of the white race. I hope that any personal experience or affiliation with immigration/ emigration would be discovered by searching for those particular words, i.e. if a senator’s parents had just emigrated from Ireland. I also looked at pictures of the senators as provided on their website. Similarly, I used gender pronouns when categorizing people’s sexes. None of the senators’ websites explicitly marked them as raced. I have compiled this information into Table A. When individuals did not have all of the demographic information on their senate websites, I found other sources and listed these in the footnotes to Table A. Admittedly, there are several faults with this method. For example, an individual may not consider themselves to be white, but do not mark any race in their biography, so I would categorize them as white despite their preference.

Language:

It was tricky to find language to discuss race. Following the scholars of critical race theory, feminist theory and queer theory, I am wary of continuing a “whites versus non-whites” binary and thereby defining groups of people by their bodily “difference” from Whites. However, I do think that there are material results of racial appearance. That is, the way that a person’s body appears does have ramifications for how they are perceived. Therefore, I will refer to white people as whites and to others either “raced” as “people of color,” “people of non-white color”

¹¹ The * symbol indicates that I am searching for a word stem, to allow for alternate endings to the word. For example, searching for “immig*” would reveal “immigrant,” “immigration” and so on.

(because white is still a color/ race) or through other categories of race, i.e black or Latino. I recognize the shortcomings of this language, but hope the meaning of the words/ theory is clear, despite the faulty language. (Similarly, words for describing women/men, and queers/ heterosexuals are all tricky binaries.)

In addition, I choose to refer to Sotomayor as a Latina. There is some controversy over whether or not Latinos/ Hispanics are “real” non-white races, or whether they are white ethnicities. To complicate it further, both the term Latino and Hispanic have their individual histories. The term Hispanic was created by Anglos as an umbrella term to describe many different nationalities that were colonized by Spain. Latino, in contrast, is a Spanish-language word and includes countries that have Latin roots, thereby including for example Brazil, Portugal and France. Importantly, Sotomayor’s family is from Puerto Rico, which though technically part of the United States, does not have its own state sovereignty, and as Sotomayor demonstrates, is still covered by the term “Latina.” Both of these words ignore real cultural differences and histories in favor of a unified front of identity. I use the word “Latina” because it is the word that Sotomayor uses to identify herself.

I start by analyzing how senators treat Sotomayor, and to what extent they “saw” her race and body. After this, I turn to how Sotomayor maneuvered within the Confirmation Hearings to resist the senators’ attacks while still being confirmed to the Court. Taken together these chapters should inject an analysis of race and gender dynamics within the Confirmation Hearings.

Part 1: Seeing Race and Sex in a Color-Blind, Post-feminist world.

It is fairly common in dominant discourse to suggest that racism and sexism do not exist on institutional or systemic levels or that individuals “see” race or gender. However, I think it is impossible to not “see” race or gender. In fact, the only way to potentially do this is to see it so much that it ceases to hold immediate meaning. For example, being a white person and being surrounded by white people and whiteness, might very well result in ceasing to “see” the white race- to forget that it exists, or to be unable to speak of any assumptions that the white body carries. In contrast, bell hooks writes in “Representing Whiteness in the Black Imagination” about how blacks are just as aware of white bodies, and have just as many stereotypes and assumptions about whites as whites do of blacks. People of color cannot afford to not “see” race: it matters what a person’s body looks like, it affects how you speak to them, how you hold yourself, whether you make eye contact. These issues are complicated, as everything always is, by sex, sexuality and class. However, people *do* see bodies and the senators at Sotomayor’s Confirmation Hearings are no different.

In this section, I analyze how senators “saw” Sotomayor’s body. Specifically, I cite examples of paternalistic treatment. Next, I find how senators’ deployed dominant stereotypes about Latinas to attack Sotomayor’s temperament and ability to judge rationally. Such concerns are specifically related to gendered and racialized notions of body and mind.

Treatment and Paternalism

To start, Senators recognized Sotomayor’s body. For example, Senator Coburn said, “I... assure you that you... will be treated *with the utmost respect and kindness.*” as if she might not

be treated that way (Day 1, 36). This reassurance is akin to saying “You will be treated like a lady” – a gendered, classed, raced, sexualized concept. These statements indicate that this might not be the normal way that every person at a hearing would be treated. In addition, it is ironic to hear these comments, knowing the extent to which she was actually *not* treated with “the utmost respect and kindness.” This statement also suggests that Sotomayor might be frightened or unnerved by the proceedings and need the protection of these senators. It could also be read as a subtle threat, reminding Sotomayor of who holds the power in the Hearings, and reinforcing any anxiety she might have had.

Sotomayor was interrupted many times while speaking. Interruption is a common trait of sexism or characteristic of male-female interactions. It is well-documented that at business or organization meetings or conferences, men frequently interrupt women (see Tannen 1994). Sotomayor was interrupted 49 times on the 2nd day of the hearing (there were only speeches on the first day of the hearing), 35 times on the 3rd day of the hearing, and 41 times on the 4th day. That is, she was interrupted a total of 125 times over the three days. Of these, only 25 times were by Democrats. There were only two female senators questioning her, but between the two of them over the course of the three days, they interrupted her a total of only 6 times. It is unclear how much of the interruption can be attributed to partisanship, i.e. Republicans wanting to get clear answers. Consider, for example:

SEN. HATCH: Well, what's your --

JUDGE SOTOMAYOR: The --

SEN. HATCH: Excuse me, I'm sorry. I didn't mean to interrupt you. (Day 2, 27)

Senator Hatch then continues to ask a different question, rather than allowing her time to finish her statement. That was a common pattern of interaction. Sotomayor was purposefully

interrupted, the interruption was acknowledged, and then continued. The interruptions literally silence Sotomayor and are part of a larger context of paternalism at the hearings.¹²

There were further examples of paternalism and gendered/ raced treatment. For example:

SEN. GRAHAM: Don't become a speechwriter if this law thing doesn't work out (Day 2, 78).

SEN. GRAHAM: And that, you know, obviously, you've accomplished a lot in your life, but maybe these hearings are a time for self-reflection. This is pretty tough stuff that you don't see from -- about other judges on the 2nd Circuit (Day 2, 80-1).

SEN. GRAHAM: Okay. Now let's talk about you. I like you, by the way, for whatever that matters. (Soft laughter.) Since I may vote for you, that ought to matter to you. (Soft laughter.) (Day 2, 81).

SEN. GRAHAM: [B]ut do you understand, ma'am, that if I had said anything like that, and my reasoning was that I'm trying to inspire somebody, they would have had my head? Do you understand that? ... Whether that's right or wrong, I think that's a fact. Does that make sense to you? (Day 2, 83).

This language and tone implies that the senator not only disapproves of Sotomayor professionally, but also personally. It is not enough that she should change her mind about court decisions, but rather that she should “self-reflect” and change her entire being. Moreover, it is striking that Graham thinks that he has the right to make such a dramatic statement. These comments do not flow from Senator Coburn’s comment that Sotomayor will be treated with “the utmost respect.” Instead, these interactions replicate a father admonishing a child for disobedience. Graham was in charge; he was the one asking the questions. He was the one giving the life lessons. Moreover, he assumed that his beliefs and understandings were the key ones.

¹² There is an age difference between Sotomayor and the senators, which may contribute to their tone and paternalism. However, I do not think it is fair to her (or to elderly people) to say that all old people are paternalistic and seek to give life advice. Furthermore, this decision to give advice indicates that the person sees the other as having done something wrong, something that needs to be corrected.

Sotomayor was supposed to work to understand *his* point of view- not he hers. Such expectations are gendered and raced- they reflect the historical reality regarding the relationship between whites and people of color and men and women. White men have used public humiliation as a form of control, particularly against raced women. Public, systemic rape of black or indigenous women, for example, is still a common tactic used to humiliate both raced women and men (who are unable to protect their wives, sisters, mothers and daughters). Though not to the same degree, these statements seek to publicly humiliate Sotomayor as a person. They also highlight the relative power of the individual actors- Sotomayor does not have the ability to respond to Graham's comment, especially in light of the criticisms made about her temperament (which will be discussed in a later section).

There were other, similar examples of paternalism and humiliation from Senator Graham. For example, he said, "But I can tell you just one thing: If I had said anything remotely like that, my career would have been over. That's true of *most* people here. And you need to understand that" (Day 2, 83). Senator Graham was once again speaking down to Sotomayor and publicly admonishing her. Moreover, he drew out the inherent body differences between her and the other people present, i.e. white males. This talking down (literally, because of the layout of the room) and public humiliation was racialized and gendered. Sotomayor was put in her place and taught a lesson.

In addition, this comment reveals Graham's own views of the position of white men within society. In this example, he was specifically referring to Sotomayor's wise Latina comment. Therefore, his comment indicated his own distorted belief that white men are somehow less privileged than other people. He did not say "If I *believed* anything remotely like that, my career would be over" rather, he says "If I had *said* anything remotely like that." Senator

Graham was highly aware of his words. Moreover, he thought that *his* words would cause a political controversy, because of his identity as a white male. In other words, he implied that, as a white man, *he* would be punished for speaking his mind while white minorities have this ability as a privilege over white people. He added that he is unable to say that “as a white man” he is better representative of his state. This can be taken as a result and perpetuation of our national discussion of race, which insists on pretending color-blindness and ignoring race rather than openly and thoughtfully considering its social construction.

Another example of paternalism and gendered language occurred on the fourth day. Senator Graham said, “I hate to interrupt, but is there a sort of a legal *cookbook* that you can go to and say ‘this is a fundamental right?’” (Graham 13, Day 4, emphasis added). First, this comment highlighted that Senator Graham was *aware* that he was interrupting, but he decided to do so anyway.¹³ Secondly, Senator Graham emphasized Sotomayor’s gender once again by asking her (a Princeton Law School graduate, and judge for seventeen years) if she used a legal “cookbook.” The pitting of the words “legal” and “cookbook” point out the stark contrast between Sotomayor’s assumed interests (in the kitchen, reading cookbooks) with her current location in the legal/ political world. Graham revealed not only a lack of respect for her professional court decisions, but also a disregard for Sotomayor’s personal ability to rationalize or read legal texts. He did not, for example, ask, “Is there a *legal doctrine* that you can go to?” Instead, he chose a gendered word (cooking is generally associated with women) and used it to feminize and admonish her- to put her in her place.¹⁴ The pairing of these words also has a

¹³ This technique for interrupting is also common with Senator Kyl. He says several times for example, “I hate to interrupt but...”

¹⁴ For me, these words bring to mind a Latina maid sitting in the kitchen of her mistress’ house and studying a cookbook. I see race, gender and class here. However, they probably evoke different images for others.

comedic element because of how incongruous they appear. Each word is so rooted in a specific masculine/ feminine sphere that to see them together is funny. It is funny to think of a “legal cookbook.” It is *not* funny to think of a judge of seventeen years being asked if she uses a “legal cookbook” to decide or interpret legal doctrine.

As suggested earlier, Sotomayor’s judicial opinions and ability to rationalize were discredited. Likewise, her statements about all individuals having prejudices and biases were reworded by Senator Coburn as: “Your *assertions* that ethnicity and gender will make someone a better judge” (Day 1, 37). Here, Sotomayor was not even credited with the word “argument” or “theory”: words that connote rationality and ability. Instead, Coburn used the word “assertion” to describe her statement, and then said that this was backed up by her “feelings and emotions” rather than numerous academic disciplines and thinkers.¹⁵ Coburn linked her judicial ability to her body, suggesting that she was governed by her “feelings and emotions” rather than her mind, and that this causes her to make silly statements. He thereby avoided actually discussing the potential validity of her argument.

In these ways, senators acted out their own internalized beliefs about race and sex. Because they did not think that they “saw” difference, they were exempt from having to reflect upon their own or experiences or locate their own body. However, they *did* see Sotomayor’s body and did treat her in a paternalistic manner because of this. Their opinions of Sotomayor’s body are addressed in the next session, which hinges on how Sotomayor’s identities were essentialized and made static.

¹⁵ For example, critical race theorists, feminist theorists, queer theorists....

Essentialism and Links to Impartiality and Temperament

Not only did the senators see race and sex, they also had very specific notions about what these identity markers meant. These beliefs were essentialized, and particularly rooted in body. The senators arrived with predetermined conceptions and *messages* that they sought to deliver to their constituents/ audience. Moreover, as the hearing was public, we can consider that the senators believed, to some extent, that their words and messages were representative of their constituents. With this in mind, the senators approached Sotomayor from two main perspectives/ goals: 1) to prove that Sotomayor's identity as a Latina *would* influence her decision-making or 2) to suggest that Sotomayor's identity would *not* affect her judging. However both of these methods assumed that Sotomayor's identity as a Latina would be inherently bad for judging- one approach sought to draw out her identity to prove an inherent bias, while the other attempted to hide it (to derace, degender and therefore whiten and masculinize Sotomayor). These approaches "normalize" Sotomayor and fought to position her as either inside or outside the "ideal neutral citizen" norm.

The questions about Sotomayor's identity are associated with an unyielding essentialism. However, essentialism is incompatible with critical theories about identity formation. If we accept that identity is in flux then we cannot make assumptions about people's beliefs or prejudices based on their body or identity. Conversely, if we do make essentialized assumptions, this reveals that we believe identity *is* actually static. That is, we believe certain people always already hold particular views simply because of their body or identity. Essentialism is rooted in identity, and is at odds with the idea of disconnected, disembodied impartiality.

The question of impartiality played a huge role in Justice Sotomayor's Confirmation Hearings, particularly because impartiality is one of the key characteristics of a "good" judge. I

argue that Sotomayor's impartiality was under scrutiny from the start for two main reasons: 1) because of her visible, marked bodily "difference"; and 2) through her speeches and activities outside of the Hearings, and specifically, her refusal to professionally separate herself from her historicized body.

Senators approached Sotomayor with clear, preconceived notions of her beliefs, beliefs that were rooted in her body. That is, senators apparently saw Sotomayor as a Latina and assumed many things about her: that she would automatically support immigrants, affirmative action, and have "empathy" (which they used to mean judicial bias) towards racial minorities. These things are clear.

For example, on the very first day, Senator Coburn said, "The burden of proof *rests on you*. But in this case, that burden has been exaggerated by some of your statements and also by some of President Obama's stated intent to nominate someone who is not impartial, but instead favors certain groups of people" (Day 1, 37). Here, Coburn manipulated Obama's stated intent to nominate someone "with empathy" to mean "favoring certain groups of people." More than this, the "groups of people" that Sotomayor might have empathy for are *assumed* to be racial minorities. Coburn did not worry that Sotomayor would take the side of whites. Furthermore, Coburn indicated that he had arrived at the hearing with the view that she was biased. He told her that "the burden of proof" was on *her* to prove impartiality. She was guilty of bias until proven otherwise. This hearing was a chance for her to therefore *prove* neutrality. We have to ask, if there was a different candidate, say a white male one, would the senator have started the hearings with an assumption of bias? And if so, how would this burden of proof or assumption of bias compare to that of Sotomayor's?¹⁶

¹⁶ Would the burden of proof be less stringent? Would the bias be more or less threatening?

Senator Schumer was more explicit in his link between Sotomayor's identity and her judging. Schumer said, "[t]he only point I'm making here, if some are seeking to suggest that your empathy or sympathy overrules rule of law, this is a pretty good body of law to look at... One would think- I'm not going to ask you to state it- that you'll have sympathy for immigrants and immigration" (Day 2, 74). By saying "your empathy or sympathy" he assumed that Sotomayor would always already, immediately, naturally, normally, have an empathy or sympathy for a group. In addition, Schumer clarified that this group would not be just any arbitrary group, but would *specifically* be immigrants. Why would Sotomayor favor immigrants? Because her family is Puerto Rican? Schumer's statement indicated that Sotomayor's beliefs would be tied to the political realities of her socially constructed identity, i.e. her Latinidad. The belief that Sotomayor would favor immigrants is particularly comfortable because of a flattened understanding of Latino/a identity in dominant white discourse. Today, Latino/a identity is conflated with immigrants, particularly from Mexico. In reality, Sotomayor is Puerto Rican; neither she nor her family had to immigrate into the United States. There is no reason that she might be more lenient toward immigrants, except that her Latina identity signals –particularly to whites- that *she* might be an immigrant. Such a characterization is in contrast to how whites view their own race as native-born.

The assumption of an essentialized politics based on identity is deeply linked to understandings of body and mind. As Dyer argues when writing about whiteness and masculinity, white people and men are assumed to be inherently rational and in control. They can control and transcend their emotions. They can be rational. In contrast, people of color and women are assumed to be ruled by their bodies. They are stereotyped as inherently excessive and emotional and unable to make rational decisions. (Of course, there is a problem with this analysis in that it

assumes a clear and static construction and delineation between races and sexes). Nevertheless, for Sotomayor, who is clearly marked as a Latina, a *woman* of non-white *color*, these tensions are heightened. She is both visibly raced and gendered. If she were a white woman, perhaps the senators could expect that she would be somewhat sensitive to women, but overall rational. If she were a Puerto Rican man, perhaps they might expect that he would have some sensitivity to Latinos (or immigrants, apparently). However, he would probably be assumed as able to control this.

The assumptions about Sotomayor's bias were further compounded by her refusal to distance herself from her body professionally. In fact, Senator Graham repeatedly brought up Miguel Estrada, a Hispanic male judicial nominee in 1990, to show that it is possible for people of color to be "unbiased" and to perhaps prove that Graham himself is not racially biased against Sotomayor. However, in a significant contrast to Estrada, Sotomayor does not disassociate herself from her body or identity. Instead, she consistently has showed race- and gender-consciousness in her choice of work (i.e. in the Puerto Rican Legal Defense Fund) and in her comments questioning the influence of personal (raced/gendered) experiences on decision-making. Not only did Sotomayor appear visibly different, she openly acknowledged this difference in her work and speeches.

It was not her race and gender that discomforted Graham, *per se*, but rather her admitting that race and gender are sources of difference in society. Graham would not "see" her race and sex, if she disassociated from them and therefore did not embody them. Or, to frame this a different way, if Sotomayor performed white masculinity (and therefore necessarily disavowed her Latina identity), *then* she could be impartial. People like Miguel Estrada (and Clarence Thomas) who deny the relevance of identity or embodiment to their political work or personal

life are therefore accepted by Graham and the conservative senators. Meanwhile, those who suggest that body and identity might influence one's life experiences are viewed as biased.

For example, on two different occasions Senator Durbin summarized his view of the overall concerns with Sotomayor. He says on the second day:

When we asked questions of the white male nominees of a Republican president, you were basically trying to find out whether to make sure that they would go far enough in understanding the plight of minorities, because clearly that was not in their DNA. The questions being asked of you from the other side primarily are along the lines of will you go too far in siding with minorities. It's an interesting contrast as I watch this play out (Day 2, 88).

On the final day of the confirmation hearings, he repeats this idea:

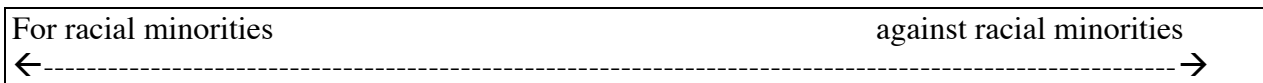
The two previous nominees, Chief Justice Roberts and Justice Alito [were] both white males. And the questioning really came to this central point: 'Do you as white males... have sensitivity to those unlike yourself? Minorities? Disadvantaged people?'.... In this case, where we have a minority woman seeking a position... it seems the question is, 'Are you going to go too far on the side of minorities and not really use the law in a fair fashion?' (Day 4, 89).

These statements made near the end of the fourth day of the hearings indicate the reality of the above discussion: the bodily characteristics of the judges have an impact on how they are perceived. Durbin made a distinction that Roberts and Alito were nominated by a Republican president, but this in itself was not really controversial. It was Roberts' and Alito's identities and marked bodies that were central to the worries about prejudice.

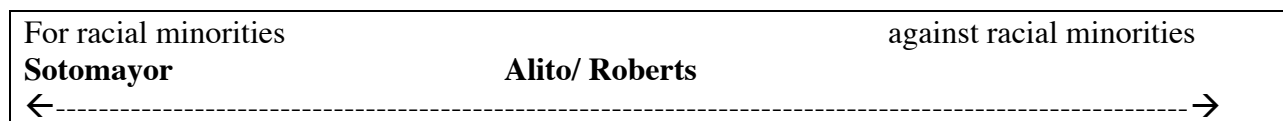
This statement implied that the senators take political party and body into considerations of bias, partiality and neutrality. If the judicial candidate were a white Republican male they might expect that he will be biased differently than a white Democratic male. However, it is doubtful that they would think either of these candidates, regardless of political party, would be *biased towards* racial minorities. They may have "empathy" or sensitivity towards racial

minorities, but they are unlikely to be viewed as biased because of their perceived whiteness. In fact, their (white, male) empathy or sensitivity might actually be viewed as positive and beneficial to judging. Rather than distance themselves from empathy or sensitivity, they might prefer to link themselves *to* empathy and sensitivity to prove how qualified a candidate they are. In their cases, despite political affiliation, we expect that 1) their biases will not determine their judicial outcomes- they will be able to *overcome* their empathy or act outside of it and 2) that they will not be inherently, immediately on the side of minorities. They will be more “neutral,” naturally, simply because of their bodies. In this case, political party may, perhaps play a part in how we view individuals (what assumptions we make about them, even as a lens that influences our view of them) but this identity is not marked on the body and does not carry the inherent threat and risk that a marked body poses. Political parties –particularly the Republican and Democratic parties- are already part of the norm and are therefore not threatening.

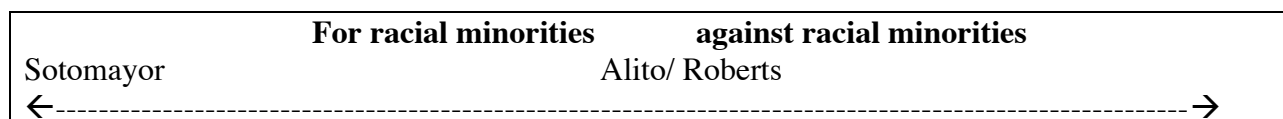
We might even think that Durbin sees a spectrum of bias for and against racial minorities:



and that judges align somewhere on this spectrum, according to their own identity. For example:



In this way, Alito and Roberts are positioned in the middle, while Sotomayor is out of the mainstream. Furthermore, it is not enough that Sotomayor will be on the side of minorities, senators worried that she would be “too far” on the side of minorities:



Durbin is very delicate in the way he discussed the impact of white race or identity on decision-making. Durbin did *not* say that they asked if Roberts and Alito would be *biased towards* white males, but rather “have sensitivity” towards racial minorities. This statement does imply Durbin believed that Roberts’ and Alito’s identities (just like Sotomayor’s) would have some sort of effect on their judging. However, for Roberts and Alito, “sensitivity” will not *get in the way* of their judging. Rather, sensitivity can be beneficial. Durbin and other senators *want* judges to have sensitivity to racial minorities. However, for Sotomayor, it is assumed that she will not only already have sensitivity, but that she might exceed this sensitivity and “go too far on the side of minorities” and perhaps thereby become a *threat* to white people by not supporting whites. In contrast, Durbin did not claim that Roberts and Alito would go “too far” on the side of whites. It was assumed that Roberts and Alito would be able to transcend any inherent biases, and rationalize *beyond* their identities. Any sensitivity on their part would be a move towards or within the “center” – not too far to one side or the other.

There is also meaning in the specific words that Durbin used to describe Roberts’, Alito’s and Sotomayor’s potential judging. For Roberts and Alito, Durbin used the word “sensitivity,” a positive word. In that sentence, it connoted flexibility and a sort of emotional maturity. “Sensitivity” is a word often attached to women, both to their physical bodies (as in having a sensitive or vulnerable body) and to their emotions. It is a feminine word. Perhaps Sotomayor was assumed to already have “sensitivity” in a sense, simply because of her gender. Meanwhile, Roberts and Alito needed to prove their “sensitivity” – that they could be “*understanding* of the plight of minorities.” For Sotomayor, sensitivity might mean that she reacted too emotionally and excessively to a subject, a way for her body to master her mind. In contrast, for Roberts and

Alito, sensitivity instead could be another way for them to put their minds over their bodies, set their prejudices aside and be better judges. Durbin asked if Sotomayor would “go too far” and if she would let her “biases and prejudices” influence her judging.¹⁷ The words “biases and prejudices” have a much different connotation than “sensitivity.” Biases and prejudices can only get in the way of judging, while sensitivity can be useful (for white males).

Moreover, the question asked if she might go “too far” on the side of racial minorities, as if there is a line or point at which a person can be *too* much on the side of minorities. Durbin did not clarify what that point might be or how a person can be “too” far. Senator Durbin’s words connote an idea of excess: that Sotomayor might be *excessively* on the side of minorities, uncontrollably, uncomfortably on the side of minorities. These are words that are raced and gendered. To be “too much” or in excess is a common, stereotypical attribute of racial minorities and women. (In contrast, white people and men are attributed with control and rationality.) Sotomayor’s assumed biases and prejudices were viewed as inflexible, static and not something of her mind, but rather rooted *in her body*. She was linked to these words because of her identity and was accorded little actual control over them. When senators questioned her about bias and prejudice, they were asking about her opinions- not about how she might set them aside.

For example, Senator Graham refused to consider that Sotomayor might be able to set aside any biases. After Sotomayor insisted that all people have biases and prejudices and that she recognized and set aside her prejudices, Senator Graham replied: “You know what? If that comes out of this hearing, the hearing has been worth it all, that some people deserve a second chance when they misspeak and you look at the entire life story to determine whether this is an aberration or just a reflection of your real soul” (Day 2, 83). Graham did not consider that her

¹⁷ For example, Senators Sessions, Graham and Hatch all ask about this on 60, around 67 and 83 of Day 2, and Hatch on day 3.

prejudices and biases could be recognized and set aside. Rather, he thought that the point was whether or not she meant her speeches, whether or not they reflected her “real soul.” Sotomayor maintained that her comment was misunderstood, while Graham emphasized that she misspoke. He only dropped the issue when Sotomayor’s appealed to an idealized, inclusive “America” in which a person’s comments can be understood in the context of their life.¹⁸

Durbin concluded his statement, as Coburn and Schumer did, by suggesting that Sotomayor will always already be biased. He said that with Sotomayor, the question was “will you go *too far* on the *side of minorities*.” This question indicates that Durbin believed Sotomayor will always already be “on the side of minorities” when judging. He also said “clearly that [sensitivity to the plight of racial minorities] was not in their [white, male] DNA.” This statement, perhaps meant as a joke, implied that a person’s DNA determines their politics and empathy. Durbin’s statement assumed that a person will have an inherent, essentialized bias *towards their own group* from birth. Durbin suggested that Alito and Roberts do not have “sensitivity” in their DNA- as if this were a characteristic that one is born with or without. Furthermore, he implied that Roberts and Alito do not have it in their DNA to even be “sensitive” to racial minorities. This is obviously not true, since people’s opinions are fluid and change over time, even those of white people.

Durbin assumed static identity and essentialism and attempted to negotiate this assumption with the requirements of judicial impartiality. Rather than ask whether or not Roberts and Alito recognized bias and could set it aside, Durbin wondered whether or not they *were* prejudiced. This assumed that how a person is, in one particular moment in time and space, is how they will always be or that their statements will reflect their actual opinions. This

¹⁸ Perhaps Graham has made some political gaffes before so that this comment is particularly convincing to him.

characterization ignores the reality of multiple consciousness, or the idea that a person's performance of identity can and will change in different settings. Rather, Durbin suggested that Roberts', Alito's and Sotomayor's identities and beliefs were fixed, even determined at birth through DNA. That, of course, white people will favor whites and Latinos will favor immigrants. This idea ignores that these categorizes are constructed and that the boundaries of such identities are shifted over time. What was considered "white" today is not what it was in the past. For example, Irish people are now considered a white ethnicity whereas they used to be considered a separate race.¹⁹ In addition, people's understandings of themselves and their own identity change over time. Different groups of people view identities differently, for example, the way a Puerto Rican person considers a third generation Mexican immigrant and their claim to a Latino identity is different than how a white person might consider these two people. Identities are ever-changing, are always in flux and depend on context (Anzaldua 1987).

Moreover, Sotomayor was also essentialized due to her sex. For example, minutes after asking about the wise Latina comment, Graham abruptly transitioned into a line of questioning about the Iraq war:

SEN. GRAHAM: Do you know anything about the group that planned this attack -- who they are and what they believe? Have you read anything about them?

JUDGE SOTOMAYOR: I've followed the newspaper accounts. I've read some books in the area. So I believe I have an understanding of that --

SEN. GRAHAM: What would a woman's life be in *their* world if they can control a government or a part of the world? What did they have in store for women?

JUDGE SOTOMAYOR: I understand that some of them have indicated that women are not equal to men.

¹⁹ Many people in various fields (ranging from political science and law to queer theory) have demonstrated how ethnicity is a route to assimilation and to gaining the privileges of full American citizenship for those with corporeal similarity to whites. This route of ethnicity is closed to blacks. For more about the connections between ethnicity and race/sexuality/ power, see Roderick Ferguson's article, "Race-ing Homonormativity." For how definitions of whiteness have expanded and contracted see Haney López's book, *White by Law*.

SEN. GRAHAM: I think that's a very charitable statement. Do you believe that we're at war? (Day 2, 83-4)

This line of questioning first of all flattens and reduces a woman's humanity and lived experience along a one-dimensional axis as "a woman's life." Graham did not consider how different groups of Iraqi women might live different lives, i.e. based on class, immigrant status, marriage state, sexuality and so on.

Second, Graham essentialized Sotomayor's identity by questioning her about women's status in Iraq. He assumed that she might have knowledge in that field, even after she indicates that her only real source of information is some newspaper articles and a few books in the general area of war. In this case, perhaps Graham even read her raced body as indicative of "others" and particularly of immigrants, so that her Latina identity gave her some further connection with "other" peoples in foreign countries (though Puerto Rico is technically part of the United States). Moreover, his words suggest that he is trying to deploy essentialist assumptions of her gender to "sell" the war to Sotomayor. It appears that for Graham, one of the reasons for the war in Iraq is to fight on behalf of Iraqi women and he thinks that Sotomayor will support this.

Lastly, these comments mark Sotomayor as inherently "different" or "other." By asking her to speak on behalf of Iraqi women, he is likening Sotomayor's life and values to those of people who are not American. Considering this comment in light of his others, it seems that he believes her experiences, values and identity are more similar to those of women in Iraq than perhaps to white men in the United States.

Graham continues his essentialist comments. For example, he later adds:

GRAHAM: And I hope one day that there will be more women serving in elected office and judicial offices in the Mideast, because I can tell you this from my point of view. One of the biggest problems in Iraq and Afghanistan is a mother's

voice is seldom heard about the fate of her children. And if you wanted to change Iraq, apply the rule of law and have more women involved in having a say about Iraq. And I believe that about Afghanistan (Day 2, 85).

This statement reveals many assumptions. First, it is obviously gendered- he is assuming a *woman* must become a mother and have children. It is also heteronormative (it takes heterosexuality as the norm, particularly as a vehicle to producing children). Graham first suggested that the “Mideast” is faulty in gender equity, and that, specifically, there are not enough women in elected office. This statement played on nationalistic ideals, ignoring the reality that the United States itself does not have many women serving in elected office (or that of the nineteen person Senate Judiciary Committee only two are females). Graham argued that “if you wanted to change Iraq” it would be essential for women to gain office. This statement indicated Graham’s belief in the “white man’s burden,” that the United States has the right and should have the desire to go to the Middle East and “change” or fix those countries. Such a belief not only downplays any role that Iraqis might have in creating change, it also drowns out their voice and cultural beliefs about what should be done. Graham’s statement came from a privileged intersection of patriarchal, white, heteronormative, imperialist, colonialist discourse. Graham simply accepted that it was acceptable for “you” to want to change Iraq.

The idea of judicial “impartiality” relies on the same argument and analysis as that judicial temperament. While judicial temperament is undoubtedly legitimately important to a court proceeding, the concept is particularly raced, gendered and classed, etc. A good judicial temperament is viewed as being rational, calm and in control. It means being disconnected from the situation, case and people before you and thereby being above the body. These are all white bourgeoisie masculine traits. As previously noted, racial minorities, poor people and women are

often seen as being unable to control their emotions (Dyer). Moreover, emotionality is pitted against logic and neutrality. Consider the following comment:

SEN. CHARLES SCHUMER: ...I'd also like to compliment you, Judge. I think you've made a great impression on America today. The American people have seen today what we have seen when you have met with us one on one. You're very smart and knowledgeable, but down to earth. You're a strong person but also a very nice person. And you've covered the questions thoughtfully and modestly (Day 2, 69).

This is a Democrat commenting on Sotomayor's temperament and praising her for it. It does not appear problematic, since he is focused on her positive traits. However, the fact that he has to point out that she is a nice person, I think, hints that there might have been some doubt as to this.

About thirty minutes later, we see Sotomayor's temperament resurface. I am quoting the full exchange to give a sense of both how Sotomayor is perceived and how she attempted to correct that perception:

SEN. GRAHAM: One thing that stood out about your record is that when you look at the Almanac of the Federal Judiciary, lawyers anonymously rate judges in terms of temperament, and here's what they said about you: "She's a terror on the bench." "She's temperamental, excitable." "She seems angry." "She's overly aggressive, not very judicial." "She does not have a very good temperament." "She abuses lawyers." "She really lacks judicial temperament." "She believes in an out-of-control -- she behaves in an out-of-control manner." "She makes inappropriate outbursts." "She is nasty to lawyers." "She'll attack lawyers for making an argument she does not like." "She can be a bit of a bully."

When you look at the evaluation of the judges on the 2nd Circuit, you stand out like a sore thumb in terms of your temperament. What is your answer to these criticisms?

JUDGE SOTOMAYOR: I do ask tough questions at oral arguments.

SEN. GRAHAM: Are you the only one that asks tough questions in oral arguments?

JUDGE SOTOMAYOR: No, no, not at all. I can only explain what I'm doing...

I do know that in the 2nd Circuit... is described as a "hot bench"... Lots of lawyers who are unfamiliar with the process in the 2nd Circuit find that tough bench difficult and challenging.

SEN. GRAHAM: If I may interject, Judge, they find you difficult and challenging, more than your colleagues. And the only reason I mention this is that it stands out when you -- you know, there are many positive things about you. And these hearings are designed to talk about the good and the bad. And I never liked

appearing before a judge that I thought was a bully. It's hard enough being a lawyer, having your client there to begin with, without the judge just beating you up for no good reason. Do you think you have a temperament problem?

JUDGE SOTOMAYOR: No, sir. I can only talk about what I know about my relationship with the judges of my court and with the lawyers who appear regularly from our circuit. And I believe that my reputation is such that I ask the hard questions, but I do it evenly for both sides.

SEN. GRAHAM: In fairness to you, there are plenty of statements in the record in support of you as a person, that do not go down this line. But I would just suggest to you, for what it's worth, Judge, as you go forward here, that these statements about you are striking. They're not about your colleagues. You know, the 10-minute rule applies to everybody. And that, you know, obviously, you've accomplished a lot in your life, but maybe these hearings are a time for self-reflection. This is pretty tough stuff that you don't see from -- about other judges on the 2nd Circuit (Day 2, 80-1).

Sotomayor is charged with having a temperament that is particularly raced and sexed. The comments about Sotomayor are emblematic of accusations that people of color and women frequently face. They reflect the same stereotypes and prejudices that are represented in popular media. It is these very projections that result in many raced and gendered individuals (and particularly those at the intersections of race and gender) to be especially wary of their conduct, of their appearance, and of their tone. Therefore, when Graham lists these comments, he is not just suggesting that Sotomayor has an inherently “bad” temperament, but also that she has failed to adequately police herself on her temperament. She is out of control on the bench, unable to contain herself. She has a chip on her shoulder. Because of this inadequacy on her part, she needs to “self-reflect” and either begin policing herself more, or give up judging. These statements and beliefs are part of a larger discourse, which assumes that raced/sexed individuals are inherently of the body and therefore uncontrollably emotional and irrational.

Particularly troubling about this exchange is that Sotomayor was unable to respond to the senator’s questions. She was unable to say that the comments about her temperament may just reflect sexism, racism or some level of discomfort with her body. With all of the fuss about her

wise Latina comment and the senator's stated fears about identity politics, this was not the space or time for Sotomayor to point out potential sexism/ racism.

The next day, Senator Cardin attempted to rehabilitate Sotomayor by reading comments about her from the same almanac that Senator Graham had used the day before. He said:

I just really want to quote from other statements that were included in that almanac, where they were commenting about you and saying that: she is very good; she is bright; she's a good judge; she is very smart; she is frighteningly smart; she is intellectually tough; she is very intelligent; she has a very good common-sense approach to the law; she looks at the practical issues; she is good; she's an exceptional judge overall; she's engaged in oral argument; she is well prepared; she participates actively in oral argument; she is extremely hardworking and well prepared (Day 3, 10).

After listing these traits, Senator Cardin gave Sotomayor a chance to respond (a slight ribbing at Senator Graham who had asked her to respond after reading the harsh comments). Sotomayor answered by generally repeating that she thought she was a particularly active and involved judge and people responded to that in different ways. Cardin then moved on to issues of voting rights. The point here is that there was no analysis or implication of how these comments about her might fit with larger societal or historical notions of temperament and body for women of color. A discussion of sexism/ racism were, I think, deemed too controversial- too out of the norm, to be brought up in the confirmation hearings- especially against specific people or in light of certain comments.

This discourse (or lack of discourse) served as a way to separate Sotomayor and her experiences as a judge from her body. Sotomayor is disassociated from her historicized body within this context by both the lines of questioning that seek to normalize her and by her own (necessary) admission to them. She was brought into the norm by being described as a good judge but this process necessitates that *she* not combat charges about her temperament. Rather, she needed someone else –another white male in this case- to do that work and make those

contradictory remarks, even though and precisely because these charges are historically raced and sexed. If Sotomayor had attempted to respond to these charges, rather than prove them wrong, she would probably have been viewed as “angry,” “excitable” and therefore confirm the lawyer’s description. In this sense, she cannot directly take the side of Latinas by openly saying, for example, “The words you are using are often racist and sexist.” Instead, she must disidentify with the process of the Confirmation Hearings. The next chapter considers more fully on how Sotomayor was able to operate in the context of the Confirmation Hearings

Part 2: Sotomayor's Strategies

The last section dealt with senators' words and the ways they indicated an awareness of Sotomayor's body. Senators treated Sotomayor in a paternalistic manner and revealed that, despite "colorblind" rhetoric, they saw race and sex and essentialized her identity. They doubted Sotomayor's ability to separate her mind from her body and therefore were concerned about her temperament. Now, we consider how Sotomayor responded to these challenges and how she maneuvered within the Confirmation Hearings. In this way, we can think of Sotomayor's words and decisions as strategies of disidentification. José Muñoz in *Disidentifications: Queers of Color and the Performance of Politics* describes how marginalized people must, to survive, disidentify with some of the politics around them. Muñoz says:

Disidentification is meant to be descriptive of the survival strategies the minority subject practices in order to negotiate a phobic majoritarian public sphere that continuously elides or punishes the existence of subjects who do not conform to the phantasm of normative citizenship (Muñoz 4)

Muñoz offers disidentification as a politics that is neither assimilationist or anti-assimilationist. It does not seek to conform to existing philosophies, but rather to reshape them and appropriate them. Because of the senators' normalization of her and assumptions about her based on her body, Sotomayor must use multiple strategies to navigate the hearings. I identify three main ways that she does this: 1) through appropriating the American Dream, 2) by performing White masculinity, and 3) by disclaiming some of her more controversial statements and professional activities.

Strategy 1: Appealing to the American Dream/ "America"

Mainstream, white discourse on American identity is based on class, gender, sexualized and racialized norms. As Americans, we show success through material goods. We gain material goods through working, particularly “working hard.” We believe that if an individual works hard, then that person will earn success. These are the basic principles of “meritocracy” and “individualism.” The success is tied to visible, material (classed) success and gendered norms: i.e. having two cars, a nice, big home with a garage, a marriage, 2.5 children, and a good job. Although the details may change over time (perhaps 3 kids becomes ideal instead of 2) or fluctuate by individuals, these general points are the basic ideas behind the American Dream. This does not take into account how race, gender, class, sexuality, etc can help, slow or even stop a person. The American Dream assumes that you will not be discriminated against. It assumes that everyone will start with and continuously have access to equal opportunities. The Dream therefore flattens difference and assumes a level playing field.

Sotomayor deployed the salience of the American Dream to be confirmed to the Court.

For example:

The progression of my life has been uniquely American.... We worked hard... Each [letter] reflects a belief in the dream that led my parents to come to New York all those years ago. It is our Constitution that makes that Dream possible, and I now seek the honor of upholding the Constitution as a Justice on the Supreme Court (Sotomayor 1-2).

Sotomayor emphasized many aspects of the American Dream and American values. In her opening statement on Day 1, she said that her family “worked hard” at the kitchen table after school every day to do well. She focused on how her mother worked full-time outside the home and then took night classes at nursing school so that she could change jobs and afford to pay for Sotomayor’s private schooling (“Sotomayor’s Own Statement”).

This deployment was strategic: Sotomayor aligned herself, from the very first day, as “American” and having American values. She downplayed any mention of her Latina heritage or upbringing, instead stating only that her parents moved from Puerto Rico to the Bronx “during World War II.” This statement, I think, was designed to give a sense of the history of her family and of how it relates to America. Perhaps playing on white nativist sentiments, she concreted herself as not “just” some Latina who recently arrived in the U.S. She specified that her parents have been in New York since World War II, and that before this they lived in Puerto Rico. This story can be viewed perhaps as a preemptive argument that differentiated her from a Latino *immigrant* (though this distinction appears to be missed in the hearings).

Referring to World War II specifically is another part of this strategy. World War II is one of those collective, shared American *memories*. Everyone in the mainstream is supposed to know about World War II, to be proud of it, even if we cannot necessarily name its participants (aside from Hitler) or U.S. policies during it. The History Channel, for example, runs program after program about U.S. military strategies and there are numerous board games that deal exclusively with WWII or have trivia questions about this subject. Also, World War II might be particularly salient to senators, whose median age is 65. These men would have been the first generation after the war, or perhaps even have been born during the war. Lastly, Sotomayor said her family moved to the Bronx, referencing another salient piece of (supposedly) collective American common knowledge. She did not need to explain what “the Bronx” was, because we, as Americans, are supposed to have some collective, classed and raced understanding of this, just as we do of World War II. In short, Sotomayor referenced dominant, shared memories and conceptions of America to position herself as within this norm.

This strategy became more apparent as Sotomory responded to senators. For example, on the next day of the hearings, Senator Kohl asked about whether or not Sotomayor thought the Supreme Court should have “gotten involved” in deciding *Bush v. Gore*.²⁰ Sotomayor deflected answering the question, saying that the case was controversial and that she should not judge what the Court had decided. Then she added that the case spurred many changes in the electoral process, and that this “is a tribute to the greatness of our American system” (Day 2, 20). Sotomayor called upon the idea of this great American system to indicate her patriotism and appeal to the collective, normalized beliefs. Rather than criticize any aspect of the American system, Sotomayor instead emphasized its greatness. This answer satisfied Kohl, and he then progressed to a different topic.

The next time the strategy was deployed is when Senator Graham questions Sotomayor about her wise Latina comment:

SEN. GRAHAM: Having said that, I am not going to judge you by that one statement. I just hope you'll appreciate the world in which we live in, that you can say those things meaning to inspire somebody and still have a chance to get on the Supreme Court. Others could not remotely come close to that statement and survive. Whether that's right or wrong, I think that's a fact.

Does that make sense to you?

JUDGE SOTOMAYOR: It does. And I would hope that we come in America to the place where we can look at a statement that could be misunderstood and consider it in the context of the person's life and the work they have done.

SEN. GRAHAM: You know what? If that comes of this hearing, the hearing has been worth it all; that some people deserve a second chance when they misspeak and you would look at the entire life story to determine whether this is an aberration or just a reflection of your real soul. If that comes from this hearing, then we've probably done the country some good (Day 2, 83).

²⁰ To put it simply, this is the case that ultimately decided who won the U.S. presidential election in 2000. It was decided 5-4 by the Supreme Court and each of the judges voted with their personal ideological preference (i.e. the liberals voted for Democrats), therefore causing some to view the Supreme Court as biased or over-stepping their boundaries.

Sotomayor said specifically that she hoped that “*in America*” one would consider a person’s comments and so on. She was offering a particular vision of an inclusive, tolerant, forgiving America. Graham accepted this image, despite his earlier words about “the world we live in,” which would not condone such inappropriate comments.

Senator Graham also asked Sotomayor about her views on identity politics. She responded by giving a definition, and then distancing herself from the politics:

JUDGE SOTOMAYOR: Personally—I don't, as a judge, in any way embrace it with respect to judging. As a person, I do believe that certain groups have and should express their views on whatever social issues may be out there. But as I understand the word "identity politics," it's usually denigrated because it suggests that individuals are not considering what's best for America...

SEN. GRAHAM: Do you believe that your speeches, properly read, embrace identity politics?

JUDGE SOTOMAYOR: I think my speeches embrace the concept that I just described, which is, groups, you have interests that you should seek to promote; what you're doing is important in helping the community develop; participate; participate in the process of your community, participate in the process of helping to change the conditions you live in.

I don't describe it as identity policies, because—politics, because it's not that I'm advocating the groups do something illegal. (Day 4, 15)

I am not concerned here about her beliefs on whether or not identity politics are “good” politics, but rather what reasons Sotomayor cites for not identifying with it.²¹ Here, Sotomayor defined identity politics, in part, as something that “suggests that individuals are not considering *what’s best for America*.” When asked whether her own work fell under identity politics, she said no, because “it’s not that I’m advocating the groups do something *illegal*.” According to this,

²¹ Identity politics is a highly charged idea- among both conservatives and liberals. As a few conservatives hinted in the confirmation hearings, identity politics is sometimes held up as causing groups to fuel resentment about inequality and to therefore cause racial/ social divisions (rather than result from existing problems). Liberals, such as queer theorists, also question the value of identity politics because it is always already exclusionary and relies on static identity formation.

identity politics is both potentially anti-American (or at least not what is best for America) and also possibly illegal. That being said, I think many people would argue that the description she provides in the second paragraph *is* actually a definition of identity politics, i.e: “groups... have interests that... [they] promote.” She did not label her work as identity politics. The interesting thing here, I think, is that she accomplished this disassociation by positioning herself as “considering what’s best for America” and as following the rules, not breaking any laws, and not doing anything illegal in her political work.

Lastly, on the third day, Senator Cornyn questioned Sotomayor about her wise Latina comment. Sotomayor responded by appealing to the idea of American meritocracy and liberal individualism, rather than discussing racial or sexual discrimination:

SEN. CORNYN: Well, you spoke about the law students to whom these comments were frequently directed and your desire to inspire them. If in fact the message that they heard was that the quality of justice depends on the sex, race or ethnicity of the judge, is that a understanding that you would regret?

JUDGE SOTOMAYOR: I would regret that, because, for me, the work I do with students... is to encourage both students and, as I did when I spoke to new immigrants that I was admitting as students, to try to encourage them to participate on all levels of our society.

I tell people that that's one of the great things about America, that we can do so many different things and participate so fully in all of the opportunities America presents. It's a message that I deliver repeatedly, and as the context of all of my speeches is, I've made it; so can you. Work hard at it. Pay attention to what you're doing, and participate (Day 3, 3).

The senator was concerned about how Sotomayor viewed the existence of discrimination and the possibility of meritocracy or achieving the American Dream. Sotomayor responded to this underlying argument. An alternative to her answer would have been for Sotomayor to answer that she regretted the interpretation of her original statement because she thinks any person can be a good judge, as long as they are aware of and set aside their prejudices. Instead of this,

Sotomayor positioned herself as supportive of body-blind meritocracy and a neutral American Dream. Sotomayor said she told Latinos and immigrants to participate fully in America because if they work hard at it, they can achieve, just as she has.

In Sotomayor's case, appealing to "America" and the "American Dream" is particularly useful because the belief indicated that racism, sexism, etc are no longer real problems. If a person like Sotomayor could overcome racism and sexism and become a judge, then this accomplishment is "proof" that institutional racism and sexism are no longer in effect. Otherwise, how could Sotomayor have ever gotten so far? Such an analysis ignores the effects of any privileges in other parts of her identity –i.e. her nationality (she did not actually emigrate to the U.S. and is a legal citizen, her parents also were able to follow a legal route into the U.S. because of the imperial relationship between Puerto Rico and the U.S.), her socio-economic class (she was able to attend a private school and meet people that helped her apply to Princeton), her intelligence, etc. These sites of privilege may have worked to overcome racism/ sexism in a way that is not generalizable, but is instead unique to her. (She may be the exception that is proving the rule.)

Therefore, her choice of words are strategic. Standing by her previous statements about the importance of the women of color in judicial positions, in this specific time and place, would deeply complicate Sotomayor's message about her belief in the American Dream. One can perhaps believe in the American Dream and believe that racism, sexism, classism, etc. exist. However, thinking through each of these requires bending your understanding of one or both of them. If we believe in the possibility of achieving the American Dream through meritocracy and individualism, then we cannot easily reconcile this with theories on the existence of institutionalized racism, sexism, and so on. This is especially true if we mix in the analysis that

these discriminations actual *help* some groups, i.e. racism/ whiteness helps whites (Delgado 2012; Frankenburg 1997; Tatum 1997; López 1996). In this way, the belief in meritocracy clashes with the belief in “isms.” One cannot believe in meritocracy and “pulling yourself up by the bootstraps” if we think that one person’s boots are always already heavier than another’s, or even that one person’s boots are purposefully being pulled down.

In sum, Sotomayor particularly called upon the American Dream and the idea of Americanness when faced with questions that indicated that she might be out of the norm. Her view of America was of a place that was tolerant and inclusive, especially of difference. In this way, these grand ideas worked to rehabilitate her identity and bring her back into the norm, back into Americanness while at the same time Sotomayor was able to maintain her integrity. In tandem with this strategic deployment of America and meritocracy, Sotomayor performed white masculinity.

Strategy 2: White Masculinity

Sotomayor was both physically and theoretically connected to white men as a way to prove her own impartiality/ neutrality and her ability to reason. She was told by the officials in the Democratic party to appear as white and masculine as possible in her dress. Senators, particularly on the Democratic side, compared her decisions to white male judge’s decisions to prove her judicial ability. In short, Sotomayor was “rehabilitated” as a White male.

First, Sotomayor was purposefully cautioned and policed in her appearance. Women and people of color are historically policed more on their choice of clothing (for example, women’s dress must often balance between the virgin/ whore dichotomy- this is raced, sexualized, classed). Josh Chambers-Letson, in his article “Embodying Justice: The Making of Justice Sotomayor”

argues explicitly about how Sotomayor was asked to perform white masculinity. He begins his argument by noting that the law operates under an assumption a “neutral” citizen, one who is necessarily white, male, and heteronormative. This imaginary neutral person is whom the law was created to protect. Chambers-Letson then moves to how Sotomayor’s statements about judging take into account that no one is actually neutral- that each person has his or her own life experiences. From here, Chambers shows that despite this understanding, Sotomayor still was in the paradoxical position of having to assume white masculinity in her dress. He quotes from Sandra Gusman’s article about how Sotomayor was advised by the Democratic administration to wear neutral colors and to avoid hoop earrings- clothing that is stereotypically linked with classed, sexualized Latina bodies. Following this prescription, Sotomayor appears at the Hearings in (boring) suits, with small earrings and “neutral” nail polish. Magazines and newspapers comment when she wears a “red” (excessive, raced, sexualized) jacket one day. In fact, many articles analyzed Sotomayor’s clothing choices in detail. Consider the following from a long article titled “Robin Givhan on Sotomayor’s Safe, Restrained Look at Confirmation Hearings:”

But if there has been a single sweeping edict from the fashion industry on the subject of workweek style, it has been for women to confidently flaunt their femininity...

This week, Supreme Court nominee Sonia Sotomayor did not appear to have been swayed by the fashion industry's argument. Not in the least.

Her wardrobe, as she sat for her daily grilling by the Senate Judiciary Committee, did not reflect the fashion industry's constant refrain. In fact, it did not even appear to have been influenced by the 21st century. Instead, Sotomayor's clothes evoked authority in the manner of a 1980s lady power broker.

... She embraced that period in fashion when femininity had no place in the executive suite.

On the first day, she wore a cobalt blue jacket that cinched asymmetrically with the help of four big black buttons. She paired it with a black shell, a black skirt and sheer black pantyhose. The color of her jacket was simple and bold. It was not a complicated shade of blue -- the kind of color that people struggle to describe because it can look different depending on the light -- nor was it subtle. Instead, it was akin to the cheerful hue made famous by Barbara Bush back in the late 1980s and early '90s.

The next day, Sotomayor wore a bright red jacket with black topstitching. She paired the three-button blazer with a black skirt and again, sheer black pantyhose. By Day 3, she had stepped away from the bright colors and instead wore a black pinstriped skirt suit that could easily have been used to illustrate the old John T. Molloy "Woman's Dress for Success" book -- a manual whose heyday was in the 1980s.

Sotomayor wore virtually no visible jewelry -- not even a watch.... Her single notable accessory was a slim bangle on her right wrist. Her neck, so exposed by her jewel collars, was bare.

Aside from her decision to emphasize skirts instead of trousers and the shoulder-length dark curls framing her face, there was nothing in Sotomayor's style that acknowledged her femininity in a significant way. Instead, her style seemed studiously constructed to deliver the least punch. It offered no hints of personality.

There were neither pins -- flag or otherwise -- on her lapel, nor any kind of personal frippery that might have drawn the eye. Her lipstick was a neutral pink gloss. Even her nails had been stripped bare; there was no hint of the cherry-red manicure that she has, on occasion, worn.

Instead, her style was an almost by-the-numbers uniform that spoke of manuals, consultants, media coaches, committees and politics. In short, it was safe and guarded. Almost all the personality had been siphoned out of it except for that bit of topstitching on her red blazer and a vaguely Edwardian flip on her bright blue collar (Givhan).

I quote this at length to show both the exhausting attention to detail that women's fashion in general includes (attention to clothing, to accessories on the wrist, on the ears, on the neck, make-up, hair, nail polish, small personal decorative ornaments/ pins) but also because this article demonstrates how Sotomayor did *not* meet these feminized expectations. Moreover, as the author hints, the image that Sotomayor projected was particularly raced/ classed and sexualized. Sotomayor was dressed like a woman in the 1980's, and particularly, as a white, middle-class,

straight wife of a politician- like Barbara Bush. This was a very particular style (in fact, an anachronistic, unfashionable, defiant one) and was chosen with care. As Givhan writes, Sotomayor's fashion had almost all of the personality "siphoned out." Sotomayor therefore appeared "safe, restrained" (as the title of the article indicates). Her image was constructed, strategically deployed and policed.

Second, Sotomayor's judicial work was purposefully analyzed in comparison to those of white male judge's. Rather than even attempt to argue that all people are inherently prejudiced, Democratic senators instead rehabilitated Sotomayor by comparing her to and describing her as a white, male judge. Senators found studies that proved that Sotomayor, contrary to popular imagination, was similar to white, male justices in decision-making. Democrats who otherwise might have been upset to find that their nominee voted with Republican (white, male) judges most of the time celebrated these facts as evidence that Sotomayor was actually not "biased." For example, consider the following quotes:

SEN. FEINSTEIN: In my view, because you have agreed with your Republican colleagues on constitutional issues some 98 percent of the time, I don't see how you can possibly be construed to be an activist (Day 2, 36).

SEN. LEAHY: ...I would also put in record, because race-related cases come up, in an independent study, Supreme Court expert Tom Goldstein found that in the 97 race-related cases in which Judge Sotomayor participated in the 2nd Circuit, she and the rest of her panel rejected discrimination claims roughly 80 times, agreed with them 10 times -- rejected discrimination claims by a margin of 8-to-1. Mr. Goldstein found that in the 10 cases favoring claims of discrimination, nine of those were unanimous, and those nine, in seven unanimous panel, include at least one Republican-appointed judge. And he said it seems absurd to say Judge Sotomayor allows race to affect her decision-making (Day 2, 35)

SEN. SPECTER: Some of my colleagues have questioned whether, as you stated, your panel in the Maloney case was really bound by Supreme Court precedent. The 7th Circuit reached the same decision your panel did. And in that opinion, *written by a highly respected Republican judge, Frank Easterbrook*, the 7th Circuit pointed out... (Day 4, 36, emphasis added).

In short, each of these statements attempted to rehabilitate Sotomayor's impartiality. They emphasized that Sotomayor's outcomes are similar to those of white, male Republican judges. These white, male Republican judges are therefore held up as the ideal, "neutral" judge. Sotomayor is positioned as similar to them, thereby gaining credibility *only* because of her relation to these judges and not as a legal thinker in her own right.

An alternate tactic is hinted at by Senator Cardin, who suggested that Sotomayor's personal experiences could actually be beneficial to the court. This senator again assumed that Sotomayor's viewpoint would be different than those of other (white, male) judges. However, Senator Cardin argued that this difference could be good, saying: "I want a justice who will continue to move the court forward in protecting those important civil rights... And if you ignore race completely, aren't you ignoring facts that are important in a particular case?" (Day 2, 14). First, Cardin inferred that Sotomayor would automatically push the court forward in civil rights, despite all of the evidence to the contrary. He, like other senators, essentialized Sotomayor's identity as being cognizant of racism and being on the side of racial minorities. This analysis ignored the fact that a person of color can still be racist, just as a woman can still be sexist, by internalizing the values of our society, even if they have little power to act upon these beliefs (bell hooks "Feminism" 3, 10-11).²² Perhaps Cardin's private meeting with Judge Sotomayor revealed that she was adamantly on the side of racial minorities. However, the Democratic senators at the confirmation hearings tried their best to disassociate Sotomayor from these beliefs.

Third, Sotomayor specifically took part in masculine banter. The Confirmation Hearings were a male space just from sheer numbers. Only two of the nineteen Senate Judiciary

²² Beverly Tatum disagrees, arguing that racism/ sexism are functions of power and serve to privilege those who wield it, therefore those marginalized by racism and sexism can not be racist/ sexist, see Tatum's "Why Are All the Black Kids Sitting Together."

Committee members were female. Only one of the eight panel members on the fourth day was female. The masculine nature of the hearings was heightened by the constant reference to gendered metaphors. In 1990, Samuel Alito, while being questioned by the confirmation committee, told the senators that a judge should be like an umpire, who calls the balls and strikes impartially. Similarly, one senator argued that judges are not umpires, but more like “quarterbacks” while the law is the play that was agreed upon beforehand. However, sports is a masculine arena. Allusions to baseball, and comparisons of judges to umpires or quarterbacks exclude women.

By indicating that judges should be like umpires or quarterbacks, the senators *at the very least* imply that their ideal judge is male. Such gendered language and allusions are heightened by the reality of the participants’ genders. The use, then, of masculine imagery, the comparisons of a judge to an athlete in a male-dominated sport, take on deeper meaning. They, knowingly or not, create an atmosphere that indicates that the committee hearings, the committee itself, the judgeship are all masculine, all male. The Hearings are a masculine ritual. The committee is a male space. The judgeship is a male position. For Sotomayor to be granted access, she must take part in the ritual and the dialogue.²³

Sotomayor did participate in this male ritual. She repeated, over and over, that she loved baseball and the Yankees. For example, she said, “[f]ew judges can claim they love baseball more than I do. (Laughter.) For obvious reasons. (Chuckling.)” (Day 2, 18). Later on the same day, the male banter became more explicit:

²³ Senators also referred to the idea of “Lady Justice.” This “Lady Justice” is supposed to be blind. This means blind to identity, and perhaps in our society “color blind.” In this way, Sotomayor’s identity as a woman as “lady justice” was pitted against Latino identity and heritage. To embody Lady Justice, she was asked to be blind to the realities of race. Moreover, the term “lady” as mentioned before, is classed and raced in itself.

SEN. SCHUMER: Right. Okay. Good. Now we'll go to a little easier topic, since we're close to the end here, but it's a topic that you like and I like. And that is, we've heard a lot of discussions about baseball in metaphorical terms.

JUDGE SOTOMAYOR: (Laughs.)

SEN. SCHUMER: Judges as umpires: We had a lot of that yesterday, a little of that today. But I want to talk about baseball a little more concretely. First, am I correct you share my love for America's pastime?

JUDGE SOTOMAYOR: It's often said that I grew up in the shadow of Yankee Stadium... To be more accurate, I grew up sitting next to my dad while he was alive, watching baseball... And it's one of my fondest memories of him.

SEN. SCHUMER: So given that you lived near Yankee Stadium and you're from the Bronx -- I was going to ask you, are you a Mets or a Yankee fan, but I guess you've answered that, right?

SEN. LEAHY: Be careful. You want to keep the chairman on your side.

JUDGE SOTOMAYOR: (Laughs.)

SEN. SCHUMER: No, no -- as much as Judge Scalia (sic) might want to be nominated, I don't think she would adapt (sic) the Red Sox as her team, as you have, Mr. Chairman --

SEN. LEAHY: Judge Sotomayor.

SEN. SCHUMER: Judge Sotomayor, I'm sorry. Who did I say?

SEN. LEAHY: Judge Scalia.

SEN. SCHUMER: Oh. I don't know what -- who Judge Scalia roots for, but I know who Judge Sotomayor roots for.

JUDGE SOTOMAYOR: I know many residents of Washington, D.C. have asked me to look at the Senators (sic) for -- (laughs).

SEN. SCHUMER: Anyway, I do want to talk -- to ask you just about the 1995 players strike case, which comes up, but it's an interesting case for everybody.

And I don't think -- you won't have to worry about talking about it, because I don't think the Mets versus Yankees will come up, or the Red Sox versus the Yankees will come up before the court -- although the Yankees could use all the help they can get right now (Day 2, 76-7).

She recounted "sitting on her father's knee" and watching the Yankees play. She is literally positioning herself with the male head of her family. The next day, a senator refers to a case where Sotomayor stopped a baseball strike as one of her most famous and important cases:

SEN. BENJAMIN L. CARDIN:... I just want you to know that the baseball fans of Baltimore knew there was a judge somewhere that changed in a very favorable way the reputation of Baltimore forever. You are a hero. They now know it's Judge Sotomayor. You're a hero to the Baltimore baseball fans. Let me explain. The Major League Baseball strike, you allowed the season to continue so Cal Ripken could become the "Iron Man" of baseball in September 1995.

JUDGE SOTOMAYOR: (Laughs.)

SEN. CARDIN: So we just want to invite you, as a baseball fan, we want to invite you to an Orioles game, and we promise it will not be when the Yankees are playing, so that you can root for the Baltimore Orioles. (Laughter.)

JUDGE SOTOMAYOR: That's a great invitation, and good morning, Senator. You can assure your Baltimore fans that I have been to Camden Yards. It's a beautiful stadium.

SEN. CARDIN: Well, we think it's the best. Of course, it was the beginning of the new trends of baseball stadiums. And you're certainly welcome. (Day 3, 9-10)

Later in the day, we see Senator Klobuchar —one of the two women on the committee— ends her questioning by casually asking about the previous night's baseball game:

SEN. KLOBUCHAR: And I will—just one last question, Mr. Chairman. All these guys have been asking about your baseball case, and they've been talking about umpires and judges as umpires. Did you have a chance to watch the all-star game last night? (Soft laughter.) Because most of America didn't watch the replay of your hearing—
(laughter) -- they might have been watching it.

JUDGE SOTOMAYOR: I haven't seen television -- (laughter)... But I will admit that I turned it on for a little while last night. (Laughter.)

SEN. KLOBUCHAR: Okay, because there was, I will say—and maybe you didn't turn it on, on this moment—but your Yankee, Derek Jeter, tied it up. But you must know that he scored only because there was a hit by Joe Mauer of the Minnesota Twins.

JUDGE SOTOMAYOR: (Laughs.)

SEN. KLOBUCHAR: I just want to point that out. All right. Thank you very much, Judge.

JUDGE SOTOMAYOR: That's what teamwork helps you with. (Soft laughter.)

SEN. KLOBUCHAR: Okay. Thank you.

SEN. LEAHY: I'm resisting any Red Sox comments. (Laughter.)
(Chuckling.) And I'm going to be careful—

JUDGE SOTOMAYOR: The president (begged ?) you all not to hold that against me, okay? (Laughs.)

SEN. LEAHY: I'm not going to use that against you.

I did see a photograph of the president throwing out the ball. I know the photographer well, and I did a very—very good shot. There are two pictures. (Day 3, 41-2)

She therefore bonded over baseball. Sotomayor displayed an in-depth knowledge about this sport: she had a favorite team, she knew what games were playing on television, she had memorized the names of various stadiums and their appearances. Moreover, this discourse can be imagined as beginning before the hearing since Sotomayor indicated that this banter included the president.

Moreover, baseball and football are routinely held up as the quintessential “American” sports. As such, by participating in these conversations, Sotomayor again leaned on ideas of “America.” At the same time, baseball is also a large part of Puerto Rican and Latino sport culture. There is some crossover between Latino and U.S. baseball in that many Latino baseball players emigrate to the United States and are given citizenship in order to play baseball. Therefore, with this example, Sotomayor appealed to a sexed activity, one that can be read by Americans and Latinos. That being said, the senators were clearly holding up baseball as an *American* sport, regardless of how Sotomayor saw it. They referred to it as “America’s pastime” and so on. The image of Sotomayor sitting with her father, watching the Yankees play was one that is supposedly American, one that is normal, and understood- one that the senators can take pleasure in discussing repeatedly. It is also undoubtedly Latino.

Sotomayor was able to be somewhat rehabilitated through her bodily performance and the links between her decisions and White male judges. However, these strategies were not enough to fully normalize her- the memory of the wise Latina (comment) haunted the senators and Sotomayor had to distance herself from these to be confirmed.

Strategy 3: Disclaiming Statements and Actions

Sotomayor specifically disassociated herself from her “wise Latina” comment and her activities with the Puerto Rican Legal Defense Fund (PRLDF). However, as the conservative senators argued, Sotomayor used this wise Latina comment many times, from 1994 to 2003. The repetition of this speech indicates that Sotomayor does believe in her statement in some capacity (or else she would have edited it out). I am interested in why and how she stepped away from this comments and from her work with PRLDF.

To begin, an exchange between Senator Cornyn and Judge Sotomayor highlights Sotomayor’s disassociation. Consider the following exchange:

SEN. CORNYN: So I want just to start with the comments that you made about the "wise Latina" speech... You indicated that this was really... a quote, "failed rhetorical flourish that fell flat." I believe at another time you said they were, quote, "words that don't make sense," close quote. And another time, I believe you said it was, quote, "a bad idea," close quote. Am I accurately characterizing your thoughts about the use of that—of that phrase that has been talked about so much?

JUDGE SOTOMAYOR: Yes, generally. But the point I was making was that Justice O'Connor's words, the ones that I was using as a platform to make my point about the value of experience, generally, in the legal system—was that her words, literally, and mine, literally, made no sense—at least, not in the context of what judges do or—what judges do.

I didn't and don't believe that Justice O'Connor intended to suggest that when two judges disagree one of them has to be unwise. And if you read her literal words, that wise old men and wise old woman—women would come to the same decisions in cases, that's what the words would mean. But that's clearly not what she meant.

And if you listen to my words, it would have the same suggestion: that only Latinos would come to wiser decisions. But that wouldn't make sense in the context of my speech either, because I pointed out in the speech that eight—nine white men had decided *Brown versus Board of Education*. And I noted in a separate paragraph of the speech that no one person speaks in the voice of any group.

So my rhetorical flourish, just like hers, can't be read literally.

SEN. CORNYN: But Judge—

JUDGE SOTOMAYOR: It had a different meaning in the context of the entire speech.

SEN. CORNYN: But Judge, she said a wise man and a wise woman would reach the same conclusion. You said that a wise Latina woman would reach a better conclusion than a male counterpart. What I'm confused about—are you standing by that statement? Or are you saying that it was a bad idea, and you—are you disavowing that statement?

JUDGE SOTOMAYOR: It is clear from the attention that my words have gotten and the manner in which it has been understood by some people that my words failed. They didn't work...

So when one talks about life experiences, and even in the context of my speech, my message was different than I understand my words have been understood by some.

SEN. CORNYN: So you'd—do you stand by your words of yesterday in—when you said it was a failed rhetorical flourish that fell flat, that they are words that don't make sense, and that they're a bad idea?

JUDGE SOTOMAYOR: I stand by the words; it fell flat. And it—and I understand that some people have understood them in a way that I never intended. And I would hope that, in the context of the speech, that they would be understood (Day 3, 2-3).

The wise Latina comment came up many times. Sotomayor described the statement as a “rhetorical flourish that fell flat” or a “rhetorical riff” (Day 2, 68). She also suggested that the comment was misunderstood or that the comment was taken out of context.

This strategy of disassociation was not the only one available. Sotomayor could have, perhaps, attempted to explain her thinking in a different way. As we see in the exchange above, she settled on comparing her comment to Judge O'Connor's, and emphasizing that she was analyzing the same legal principles as O'Connor. Sotomayor argued that she could not have meant what other people believe (that she thinks white men cannot be wise) and that therefore the wise Latina comment was a rhetorical flourish that fell flat.

It is not Sotomayor's comment about Latina's personal experiences being valuable or enriching that caused problems, but how this comment might play out in broader settings. The senators appeared concerned (not just in the above passage) that 1) Sotomayor's personal experiences (because she is Latina) might supersede rational or legal thought, and 2) that she implied Latinas are naturally wise and that white men cannot be. On the first point, she argued repeatedly that she could set aside her personal experiences to judge neutrally. However, she did not and could not argue that everyone else (particularly white males) must do the same. On the second point, she must back down. Still, the interpretation of her words in the hearings did not have to be the only one and she did not offer the alternative, the one about the existence of discrimination and the value of knowing that discrimination exists (in order to set aside personal biases). She could not make this argument in this context, just as she could not explicitly argue against the senator's paternalistic treatment, essentialism or comments about her temperament.

Similarly, Sotomayor distanced herself from some of the activities of the Puerto Rican Legal Defense Fund. Although she at times explained that this fund was similar to the National Association for the Advancement of Colored People (NAACP) and the Mexican Legal Defense Fund (in contrast to some categorizations that it is a liberal, radical, activist organization), she ended up disclaiming this work. For example, she claimed that she never knew what issues the Fund was working on, even though she was a board member and Sessions later proves she did (for example on Day 2, 86 and 87 she argues that she did not review any briefs in the PRLDF about "taxpayer funded abortion"). Graham continued with other examples:

SEN. GRAHAM: And the point I'm trying to make is that whether or not you advocate those positions and how you will judge can be two different things. I haven't seen in your judging this advocate that I saw—or this board member.

But when it came to the death penalty, you filed a memorandum with the Puerto Rican Legal Defense Fund in 1981, and I would like to submit this to the record,

where you signed this memorandum and you basically said that the death penalty should not be allowed in America because it created a racial bias and it was undue burden on the perpetrator and their family. What led you to that conclusion in 1981?

JUDGE SOTOMAYOR: The question in... '81... was an advocacy by the fund taking a position on whether legislation by the state of New York outlawing—or permitting the death penalty should be adopted by the state.

I thank you for recognizing that my decisions have not shown me to be an advocate on behalf of any group. That's a different— dramatically different question than what—whether I've followed the law. And in the one case I had as a district court judge, I followed the law completely (Day 4, 16-7).

Senator Graham was particularly interested in her activities with the PRLDF against the death penalty. Sotomayor deflected this by arguing that the work was not illegal, and that she was not actually “an advocate on behalf of any group.” These particular PRLDF campaigns about abortion (applying to lower class, Latinas) and the death penalty (applying to lower class, Latinos) are both gendered and racialized. The conservative senators focus on Sotomayor's involvement in these campaigns, but by likening the PRLDF to the NAACP, by saying the work is legal and by claiming that the PRLDF does not necessarily reflect her own views, she was able to move beyond the raced, gendered and classed issues.

These two areas, her wise Latina speech and her work with the PRLDF were two of the areas where her raced/gendered body was put to the forefront. We cannot escape her identity on these issues. The wise Latina comment was centered around the value of Latina identity. The PRLDF advocates specifically on behalf of Puerto Ricans. Whereas Sotomayor could speak about baseball and have this discourse be taken as an example of her *Americanness* (rather than *Latinidad*) she could not escape the racialized/ gendered nature of her speeches and activities. Therefore, she appeared to simply drop them. She did not argue back about the inherent value of either her speeches or her professional work, and more importantly, neither did any of the

senators from her nominating party. Everyone was *silent* on the importance of providing poor women with abortion options or allowing Latino men to not be put to death. This was particularly interesting because 1) Sotomayor only needed and should already have a majority of votes to be confirmed, so she should theoretically have been able to say more controversial things and 2) because her options were not so straightforward as either arguing back or not.

Since she was being questioned in her ability to be impartial, she could not argue that discrimination still exists. As Sotomayor's very temperament was in question, it would not do for her to push back against senators. Since she was viewed as having an essentialized identity, she could not take the side of her historicized body or suggest that her Latina identity was actually important to her. She countered these limits by appropriating and deploying the dominant white beliefs about America (such as inclusion, meritocracy), by performing white masculinity (both physically and theoretically) and by distancing herself from overtly racialized/ sexed activities.

Conclusion

In the end, Sotomayor was confirmed by the full Senate, with 68 votes to 31. Every Democrat voted for her, while all but nine Republicans voted against her. Of those Republicans on the Senate Judiciary Committee, only Senator Lindsey Graham crossed party lines to vote for her. This information can certainly lend itself to a political analysis of the hearings. However, I would urge that we not stop our analysis by just splitting the senators into Democrat versus Republican groups. Instead I hope that we can consider the dominant discourses on race and sex (particularly that these discourses do not exist/ that we are color/ gender blind) as they are reflected within the Confirmation Hearings. In this paper, I have tried to think about both how Sotomayor was treated because of normalized assumptions about her body (the way she was

treated, the questions that she was asked, the hesitancy about her rationality) and how she responded in light of these assumptions.

Rather than addressing issues of race and sex head on, Sotomayor had to maneuver by appealing to notions of America and the American Dream, by performing white masculinity and by disassociating herself from some of her more controversial and raced/ sexed statements and activities. These strategies were successful for her: She was allowed onto the Supreme Court. However, her treatment, the assumptions made about her and the level of strategy that had to be deployed indicates the limits of race theory, feminist theory and so on in reaching the public.

Perhaps more importantly, few senators dared to actually challenge the dominant discourse at the hearings. I think this *silence* especially on the part of her nominating party speaks to the strength of these normalizing discourses. The Democrats had the amount of votes needed to confirm her but did not speak out against, or perhaps even recognize, the racist and sexist implications of the senators' treatment and questioning. For example Senator Durbin does say on the fourth day of the hearings that he believes Sotomayor's "life is one of achievement, overcoming some odds that many people have never faced" (Day 4, 88). However, Durbin does not enumerate these odds. Neither does Sotomayor. Senator Dianne Feinstein implied that she was angry at some point, by saying that her "adrenaline was moving along" against questions that were "in their very nature... provocative" and perhaps designed in a racist or sexist way (Day 2, 36). However, no one truly expands upon this, about why these questions or treatments might have made her adrenaline move along. There is no reflection on the questions being asked or how they might be perpetuating national norms and beliefs.

The hearings indicate, first, that much work still needs to be done on a national level for changing how people think about race, gender, class and so on. It is deeply problematic that the

hearings, full of highly educated people, and supposed representatives of the public, could not have a critical and honest discussion of race/gender without resorting to essentialism and assumptions about identity and the influence of body on thought. The academic theories revolving around race, gender, sexuality and power have not “trickled down” to the general public- or for that matter, over to the political elites. How can we get these thoughts and questions out to more than just the people currently studying them?

Second, and perhaps more importantly, I believe the hearings highlight the difficulty for those individuals of marked difference who attempt to enter institutionalized, white heteropatriarchal spaces. Sotomayor, for example, had to listen to many painful remarks and assumptions about her body, her identity, her ability to rationalize, to think, her suitability for a position of power. And all of this had to be done without ever losing control of her emotions, because doing so would confirm and exemplify the beliefs of the people in that space. She shouldered the responsibility of performance in the sense that any mishap on her part would be reflective of her race (and perhaps, her sex). In stark contrast, the senators had little of this responsibility. Their words and actions neither reflect(ed) on them or their race/ sex.²⁴

That being said, I would like to end on a positive note: Sotomayor was confirmed. I hope that with time, and with more thought, we will have a more honest, critical reflection of sex, race, identity and power even and especially in political spaces (which is to say, everywhere). It is time that we give up this illusion of color-blindness and post-sexism to actually deal with real problems that currently exist, problems that are rooted in and perpetuated by our purposeful blindness to bodies.

²⁴ It shocked me to hear that Senator Orrin Hatch, for example, is running for Senate again this year. Although I have not included it here, he had some interesting comments about the importance of reverse discrimination cases.

Table A
Demographics

Name	State	Party	Sex	Race	Latino Population as % of State²⁵	Vote Yes or No?²⁶	Age²⁷
Patrick Leahy	Vermont	D	M	White	1.5	Y	69
Jeff Sessions	Alabama	R	M	White	3.9	N	63
Charles Grassley	Iowa	R	M	White	5.0	N	76
Herb Kohl	Wisconsin	D	M	White	5.9	Y	74 ²⁸
Russell Feingold ²⁹	Wisconsin	D	M	White	5.9	Y	56
Chuck Schumer	New York	D	M	White	17.6	Y	59
Ben Cardin	Maryland	D	M	White	8.2	Y	66
Dianne Feinstein	California	D	F	White	37.6	Y	76 ³⁰
John Cornyn	Texas	R	M	White ³¹	37.6	N	57
Sheldon Whitehouse	Rhode Island	R	M	White	12.4	N	54
Lindsey Graham	South Carolina	R	M	White	5.1	Y	54 ⁶
Jon Kyl	Arizona	R	M	White	29.6	N	67 ⁶
Tom Coburn	Oklahoma	D	M	White	8.9	Y	61 ⁶
Dick Durbin	Illinois	D	M	White	15.8	Y	65
Amy Klobuchar	Minnesota	D	F	White	4.7	Y	49 ⁶
Edward Kaufman	Delaware	D	M	White	8.2	Y	70
Al Franken	Minnesota	D	M	White	4.7	Y	58
Orrin Hatch	Utah	R	M	White	13.0	N	75
Arlen Specter	Pennsylvania	D	M	White ³²	5.7	Y	79 ⁶
		63%	89%	100%			
		D	M	White			
						68% Y	Media n: 65
Sonia Sotomayor	New York	--	F	Latina	17.6	N/A	55 ³³

²⁵ This is U.S. census data for 2010, the closest available data to the confirmation hearings (summer of 2009). The census states that “Hispanic” was considered an ethnicity.

²⁶ This information is derived from the Political Guide website.

²⁷ This is the senator’s age at the time of hearings, derived from his/her website.

²⁸ This is from the Washington Post’s “U.S. Congress Votes Database” online.

²⁹ Russ Feingold did not have a senate website. All information about him is from the U.S. Congress’ Biographical Directory and from the NNDB website. The NNDB site lists that Feingold is Jewish, and of Polish, Russian and Ukrainian ancestry but born in the U.S.

³⁰ This information was from the entry in the U.S. Congress’ Biographical Directory.

³¹ Senator Cornyn’s website listed that he serves on several committees dealing with “Hispanic affairs” and that he has received awards from Latino identified groups. However, his website emphasizes that he and his parents are all native-born Texans. I searched further to see if he might be descended from Hispanics/ Latinos/ Mexicans but did not find anything.

³² Specter was born in Kansas to immigrant, Russian parents (biography.com).

³³ This is from the biography.com website.

Senator's Websites:

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Jeff Sessions:

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Chuck Grassley: <http://www.grassley.senate.gov/about/Biography.cfm>, accessed May 2012.

Herb Kohl: <http://www.kohl.senate.gov/bio.cfm>, accessed May 2012.

Russell Feingold: unavailable

Chuck Schumer: <http://www.schumer.senate.gov/>, accessed May 2012.

Ben Cardin: <http://www.cardin.senate.gov/>, accessed May 2012.

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- Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr, Nominee to be Chief Justice of the United States).
- Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006).

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